SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION, AND FEDERAL POWER COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER UNITED GAS PIPE LINE COMPANY

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UNITED GAS PIPE LINE COMPANY,

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER UNITED GAS PIPE LINE COMPANY

Opinions Below

The opinion and order of the Federal Power Commission, unreported, appears at R. 1. The several opinions of the Judges of the Court of Appeals for the Third Circuit (R. 139) are reported at 215 F. 2d 883.

Jurisdiction

The judgment of the Court of Appeals was entered on September 7, 1954 (R. 155). No petition for rehearing was

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[1] This is a companion case to Federal Power Commission v. Mobile Gas Service Corporation, No. 31, this Term, pending before this Court on writ of certiorari.

filed. That Court reversed a judgment and order of the Commission[2] entered in Docket G-2225 on December 7, 1953 (R. 1), and directed specific action to be taken by the Commission as sought by Mobile. The petition for writ of certiorari was filed on November 5, 1954, and was granted on February 28, 1955 (R. 157). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

Questions Presented

1. Whether Congress, in enacting pursuant to the Commerce Clause the complete and exclusive scheme of regulation of the Natural Gas Act, intended and provided that a private contract fixing rates subject to the jurisdiction of the Federal Power Commission and filed with said Commission as a rate schedule should render inoperative and unenforceable the filed rate provisions of Section 4 of said Act so that a natural gas company cannot make or file with the Commission the change in rates contemplated and required by Section 4(d), and so that the Commission cannot permit or accept, but must reject the filing of change in rates by the natural gas company until first such private contract is set aside as against the public interest in a proceeding brought for that purpose.

2. Whether Congress in the Natural Gas Act has empowered the Federal Power Commission by its own order, or authorized the courts to direct the Commission by order, to require refund of monies collected from a change in rates for the sale of natural gas for resale for industrial use only filed by the natural gas company pursuant to Section 4(d) of the Act, but not subject to suspension under Section 4(e) of said Act.

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[2] For clarity and convenience the Respondent Federal Power Commission will be referred to herein as "The Commission"; Respondent Mobile Gas Service Company will be referred to as "Mobile"; and Petitioner United Gas Pipe Line Company will be referred to as "United".

Statute Involved

The pertinent provisions of the Natural Gas Act (Act of June 1, 1938, Ch. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq.) are set forth in the appendix filed herewith (p. 1-8).

Statement

On January 1, 1936, before passage of the Natural Gas Act[3], Mobile and United's predecessor contracted for sale by United and purchase by Mobile of natural gas at city gate delivery for resale by Mobile to domestic and industrial users (R. 81-6). All obligations of the contract were made expressly subject to valid orders of all governmental bodies, state and federal, having lawful jurisdiction (R. 24).

Pursuant to Section 4(c) of the Act this contract was filed as a rate schedule with the Commission on August 22, 1938, being styled "Rate Schedule F. P. C. No. 20" (R. 9, 24). Supplement No. 7, dated October 17, 1941, was filed with the Commission November 10, 1941, retroactively effective July 1, 1941 (R. 86, 55). Article VI thereof added sub-division (C) "Special Industrial Gas" providing for sale through separate facilities of natural gas for resale for industrial use only at a price of ninety per cent (90%) "of the proceeds received or receivable by Buyer * * *," provided such 90% should never be less than sixteen cents (16c) per thousand cubic feet except upon United's consent in writing (R. 86). The contract term was extended to July 25, 1962.

The Commission's order permitting Supplement 7 to be filed contained a caveat that such action was not to be construed as constituting Commission approval of any provision, term, or condition contained therein (R. 56)[4]. Thus

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[3] Hereafter referred to as "Act".

[4] Cf. Hope Natural Gas Co. v. F. P. C. (1952, 4 Cir.) 196 F. 2d 803, 806.

in 1941 the Commission notified Mobile and United that it did not approve a contractual provision such as Mobile sought to enforce by the contract.

Supplement No. 10 to Supplement No. 7, the contract amendment involved here, dated June 28, 1946, provided for additional delivery under the special industrial gas clause of sub-division (C) above, in Supplement No. 7, for resale for industrial purposes only to Mobile's customer Ideal Cement Company (R. 90). It requested United's consent to reduce the price from ninety per cent (90%) to eighty per cent (80%) of the proceeds received by Mobile. It provided in a tax adjustment clause for reimbursement to United of any additional taxes which might be imposed as therein set out. United conditioned its consent:

> "Subject to our obtaining the approval of the Federal Power Commission, the foregoing is agreed to and accepted this 30th day of July, 1946" (R. 95).

Commission consent, save as to the money rate, was denied by an enlarged caveat in its order of September 23, 1946, permitting the filing, as follows:

> "(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above designated schedule, *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate*" (R. 57)[5].

Supplement No. 9 dated July 30, 1946 (R. 88-90) was permitted to become effective as of January 1, 1947 (R. 57-8) with a caveat similar to that just above. This amended the provisions of Supplement No. 7 relative to industrial

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[5] All emphasis or italics in this brief supplied by the writer unless otherwise shown.

gas and added a ratable provision for priority of deliveries under specified conditions of shortage.

Thus, the Commission permitted Supplement No. 10 to Supplement No. 7, involved here, to be effective only as a current rate filing under the Act, subject to changes or modifications in said rate under the scheme of the Act, free from "any claimed contractual rate or obligation" for a firm rate not subject to change (as Mobile contends). Such was also the law.

Commission approval, the pre-condition to United being contractually bound in said Supplement No. 10, was denied by the caveat in the order; neither United nor Mobile objected; neither appealed to the courts. Thereby the claimed contractual provision for firm rates for a definite period became inoperative.

Thereafter, on October 30, 1948, the Commission promulgated Order 144 amending its general rules and regulations. This required all rates to be stated in dollars and cents, and prohibited percentage and tax adjustment clauses, which were the heart of Supplement 7 and supplement 10 to Supplement 7.[6]

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[6] Under heading "Restatement of Schedules Filed Prior to December 1, 1948" (thus applicable to the original contract and Supplement 7 and Supplement 10 to Supplement 7), § 154.81 made the new rules expressly applicable to all "effective schedules of rates * * * and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948" not prepared in accordance with §§ 154.31 through 154.41. § 154.82 provided:

> "REQUIREMENT FOR RESTATEMENT. All effective schedules of rates * * * and contracts not prepared in accordance with §§ 154.31 through 154.41 shall be restated and filed as parts of the tariff in accordance with said sections on or before the date specified in § 154.83, and duly posted at the time of filing; Provided, however, that price provisions which cannot be restated in cents or in dollars and cents per unit as required by § 154.38(d) without effecting a change in rates or charges may be retained in effect without change. Provided, further, that when necessary, pending completion of restatement within the time provided for by Section 154.83 schedules may be filed in accordance with this part as in effect prior to December 1, 1948."

The required restatement pursuant to Section 154.38(d)(3) provided:

> "No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which

Statement pursuant to Section 154.85 required by Order 144 was filed with the Commission (R. 58-9) showing the vast changes these rules wrought in Mobile's contract, irrespective of the caveat of the order permitting the contract and amendments to be filed. The Court below erroneously failed to recognize such changes. No part of Supplement No. 10 to Supplement No. 7 could be or was retained, indeed, none of the supplements to Supplement No. 7 were retained. Examination of Supplement No. 10 to Supplement No. 7 (R. 90-95) demonstrates it was totally within the prohibitions of Order No. 144. (See Footnote 6, p. 5 herein). The conversion tariff and statement were approved and permitted to be filed (R. 60-4) and so were adjudged correct. The cancellations wrought by the Commission's rules were found to be supported by "good cause" and expressly approved. (Finding 2, R. 63; Order (C) R. 64 at

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in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural gas company may state in the service agreement or in the rate schedules filed pursuant to § 154.52 that it is or will be its privilege under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge; Provided further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part."

Section 154.85 provided:

"STATUS OF CONTRACTS FILED AS RATE SCHEDULES AND RESTATED. Each contract which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff. Provided, however, That the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: Provided further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

Statement relating to Mobile's contract made pursuant to Section 154.85 was filed as required (R. 58-9), and was permitted to become effective as correct (R. 60-64).

Docket G-2019, R. 60-64.) Thus the contract (Supplement 10 to Supplement 7) which the Court below ordered the Commission to honor has not been effective since July 31, 1952, when the Commission in Docket G-2019 ordered the conversion tariff, successor to the contract, to be filed (R. 60). Mobile did not appeal under Section 19(b) of the Act from this change in its contract and thus it is bound. *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381; *Tyler Gas Service Company v. United Gas Pipe Line Company*, (D.C.E.D. Tex. 1953) unreported (R. 75-6), affirmed (1954, 5 Cir.) 217 F. 2d 73.

Proceedings Before The Commission

On June 24, 1953 (R. 66) United, pursuant to Section 4(d) of the Act, filed at Docket G-2210 an application for increased rates, including rates for gas sold to Mobile for resale to Ideal for industrial use only. By order issued July 10th, 1953 (R. 66) the Commission ordered that such rates applicable to Mobile "are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension," provided for a full hearing pursuant to Section 4(e) to begin July 20, 1953, consolidated Docket G-2210 with several pending proceedings, including Docket G-1142 (a Section 5(a) investigation of all of United's rates instituted in 1948, R. 65), and permitted such increased rates to become effective on July 25, 1953.

On July 16, 1953, Mobile moved to intervene in the consolidated docket, including Dockets G-2210 and G-1142 (R. 70). On August 14, 1953 (R. 72) the Commission permitted Mobile to intervene in Docket G-2210.

On August 4, 1953, Mobile filed in the consolidated dockets G-2210 and G-1142, et al, a petition to set aside or modify the order of July 10, 1953, issued in Docket G-2210 (R. 21). On August 7, 1953 (R. 19) Mobile filed, in the consolidated

dockets a motion to substitute a first page in its petition attacking the order issued in Docket G-2210, to remove the consolidated docket numbers, and to re-file the same as an independent proceeding with an independent number. This motion was granted and the petition docketed at G-2227 (R. 7-18). By this petition Mobile collaterally attacked the order of July 10, 1953, issued in Docket G-2210 and in the absence of all parties to the consolidated dockets, including Dockets G-2210 and G-1142, sought the Commission to set aside, annul, modify, or amend said order in the following particulars:

(1) To annul and set aside that part permitting the filing of the First Revised Sheet 40 and Second Revised Sheet 39 covering sale for resale for industrial purposes only to Mobile for its resale to Ideal Cement Co.; and substitute a rejection because Mobile, having a contract, had not consented (R. 8, 11-12, 17, 2);

(2) To cancel, annul and set aside that part consolidating Docket G-2210 with other consolidated dockets and setting hearing for July 20, 1953; and substitute an order separating and severing Docket G-2210 and ordering a hearing solely on Revised Sheets 39 and 40 applicable only to Mobile (R. 8, 17, 2);

(3) To annul, cancel and set aside paragraph (D); and substitute therefor a paragraph expressly denying and refusing to permit Revised Sheets 39 and 40 to become effective on July 15, 1954 (R. 8, 13-16, 17-18, 2); and

(4) To insert a new decree directing United to refund to Mobile the difference, if any, between the claimed contract rates and the rates finally allowed in Docket G-2210 (R. 8, 16-17, 18, 2).

United filed a petition to intervene and an answer (R. 22-31) raising contentions advanced below and here. Mobile filed a reply (R. 31-38).

The Commission, after granting United's right to intervene, correctly refused this relief upon the following grounds (R. 1-6):

(1) Rejection was denied because filing was pursuant to and in conformity with, Section 4 of the Act, the only section by which a rate increase could be initiated, and which also prohibited suspension of industrial resale rates (R. 3);

(2) No good cause for separate hearing shown while the contrary appeared, particularly due to Docket G-1142, a 5(a) proceeding investigating all rates of United, the Commission's discretion and experience being that such consolidation and joint hearing was more reasonably calculated to permit full and proper consideration, and that United had already offered its direct case (R. 3-4);

(3) Refusal to permit revised rates to become effective would be improper; the Commission had clearly reserved both its right and intent to examine into reasonableness and propriety of the proposed rates; called attention to the caveat of Section 154.23 of its rules (generally similar to the caveat in the orders quoted above) (R. 4-5); and

(4) Denied insertion of provisions for refund because Section 4(e) permitted refunds only of suspendible rates, whereas these were non-suspendible industrial rates (R. 5).

Mobile's motion for rehearing (R. 38) reasserting grounds (1), (2), and (4) (p. 8 supra), was denied by order dated February 4, 1954 (R. 46). Mobile filed a petition to review pursuant to Section 19(b) of the Act in the United States Court of Appeals for the Third Circuit.

The Decision Of The Court Of Appeals

The Court of Appeals permitted United to intervene (R. 110). The Commission appeared in defense of its

order. The Court of Appeals in an opinion written by Judge McLaughlin and concurred in by Judge Staley, with Judge Hastie dissenting, set aside the Commission's order which rejected Mobile's petition in Docket G-2227 and directed the Commission to amend its order of July 10, 1953, in Docket G-2210 to reject the filing of the revised sheets insofar as they affected the Ideal Cement Company contract; further directed the Commission to amend paragraph (D) thereof so as to deny permission for the revised schedule to take effect.[7] The Court held that the Commission should have rejected the filing until it had first determined the reasonableness or unreasonableness of the "existing"[8] contract rate, and that all monies collected on the basis of the "void" order were unlawfully collected and should be returned to Respondent (R. 139).

The dissent of Judge Hastie was:

> "The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent" (R. 155).

The substance of Judge McLaughlin's opinion is as follows: The question is stated to be whether a natural gas company can wipe out a filed rate contract by filing an increased rate schedule.

After stating the history of the contractual arrangement, he apparently treated the conversion tariff as affecting no change and sought to distinguish the opinion of the District Court in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (D.C.E.D. Tex., 1953, R. 75-6), (affirmed

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[7] Mobile in its petition for rehearing (R. 38) did not specify as error as required by Sec. 19(b) of the Act the position originally taken on paragraph (D) of the order (R. 2, 8, 13-16, 17-18). Thus the Court was without jurisdiction to make this holding and order. *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

[8] The contract rate had not existed since the Commission ordered the conversion tariff filed on July 31, 1952 (R. 60). See p. 6-7 herein.

1954, 5 Cir. 217 F. 2d 73), on the ground that the conversion tariff filing in *Tyler* was an adversary proceeding, (in fact, it was the same tariff with filing accomplished by the same order in Docket G-2019 (R.60)) and also reasoned that the *Tyler* case rule was different because involving rates subject to suspension. The implication was that suspension was equivalent to a proceeding to abrogate the contract (R. 141, FN 3).

The opinion reasoned that the dispositive issue in a proceeding under Section 4(e) was the reasonableness of the proposed rate which would stand upon an affirmative answer, so that no consideration would thus be given the "accepted" contract or the circumstances under which it was entered into, or the "long term commitments sanctioned by the Commission", (thus ignoring the express refusal of the caveat to approve or sanction the contract) and whether the rate fixed by the contract was unreasonable and against the public interest under the facts. The result of the application of Section 4(e), the opinion stated, particularly in the absence of the power to suspend an industrial rate, would leave Mobile bound to Ideal while paying the increased rate to United, though the United-Mobile contract had not been construed in any way to be against public interest.

Coming to the Act, he held that it did not expressly permit abolition of contract rights "by a mere unilateral filing of new rates." To permit that without first finding the contract and its rates unreasonable would not result in reasonable regulation, which the Act contemplated, and would impair common law contract rights.

He thought the contract rate would not be automatically nullified because of a low return, but consideration should be given to the fact that the Ideal Cement account represented important new business both to Mobile and to United. The opinion then turned to the legislative hearings and drew from them a "reasonable inference" that Congress

intended the Commission to have power to eliminate a private contract as result of a hearing and finding that the same was against the public interest, but did not intend that the natural gas company could destroy such contract by a unilateral action. Support in this conclusion was sought by finding that the hearings also supported the implication that Congress intended non-suspendibility of industrial rates to apply only to short term contracts, and that Congress did not visualize that one contracting party under cover of the Act would attempt to avoid its contractual duties. (Thus the opinion apparently implies a hiatus in the Act as to long term industrial rate contracts, without defining short term or long term.)

The Court then sought to distinguish its holding in *Mississippi River Fuel Corporation* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899, (petition for cert. dismissed, 345 U.S. 988) and advanced to the conclusion,

> "Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned * * *" (R. 154-5).

It thereupon directed the Commission to amend its order of July 10, 1953; and therein "to reject the filing of the Revised Sheets insofar as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph (D) of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, * * *" (R. 155).[9] Judge Hastie dissented, as noted above.[10]

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[9] See Footnote 7, p. 10 herein.

[10] After filing of the petition herein, Mobile and United changed the industrial resale disposition so that, subject to approval of the Commission, United as assignee of nine industrial contracts of Mobile, including Ideal

Summary Of Argument

I.

A. The clear language of the Act evidences that private contracts are intended to be unenforceable and inferior to the paramount rate regulatory provisions therein. Congress intended to occupy fully the "gap" between production and distribution of natural gas to subserve the public interest identified in Section 1(a).

Sections 4(a) and (b) declare the public policy that "all rates and charges * * * shall be just and reasonable," prohibit all other rates, and prohibit preferences or advantages, or unreasonable differences in rates.

Only the natural gas company is mandatorily required to charge and propose, pursuant to Section 4, just and reasonable rates. This is balanced by the complementary provisions of Section 5(a) requiring a hearing upon complaint by specified parties against a filed and currently applicable rate. The Commission is fully armed if it orders hearing under Section 4(e) with the same powers it can

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Cement Company, would make direct industrial deliveries, and Mobile would receive 2¢ per MCF for transporting the gas. On April 15, 1955, the Commission issued its order approving such rearrangement and making it effective from and after April 15, 1955. This leaves unaffected the questions presented in this case, whether United's contract with Mobile rendered Section 4 of the Act inoperative, deprived United of right and authority to file pursuant to Section 4 of the Act increased rates on June 24, 1953 (R. 66), and rendered such filing void with consequent lack of the Commission's power to receive such filing (Question 1). Also, whether such increase in rates of 3.5¢ per MCF which by said order (R. 66) became the filed and only legal rates and were collected from July 25, 1953 to April 15, 1955, can be ordered refunded as illegally collected (Question 2). If Question 1 be answered favorably to United, such would automatically result in reversal of the Court below on Question 2. If Question 1 be answered adversely to United, Question 2 remains for decision whether the Court below could so order refund of such increases in industrial resale rates not subject to suspension under Section 4(e) which section limits the power of refund to suspendible rates filed pursuant to Section 4(d). Thus the change does not alter the questions for decision or the necessity for authoritative interposition of this Court.

exercise under 5(a). Thus Congress proposed a comprehensive scheme of rate initiation and rate regulation applicable to all alike pursuant to a design and scheme wholly exclusive and inclusive. The intention apparent from the face of the Act is that Congress intended the statutory regulation to replace every other device including contract provisions about the subject matter of the regulation.

The Act was taken in direct lineage from the Interstate Commerce Act, and thus the philosophy of *Armour Packing Company* v. *United States*, (1908) 209 U.S. 56, and *Producers Transportation Company* v. *Railroad Commission of California*, (1919) 251 U.S. 228, are applicable and demonstrate the statutory superiority to contract which, by the necessities of the public policy declared, must in all things be subject to the Act.

B. The rationale of cases dealing with the general principle of relative weight of private contract against governmental or public regulation reinforces the manifest purpose of the Act. Thus the decision in *Union Dry Goods Company* v. *Georgia Public Service Commission*, (1919) 248 U.S. 372 is controlling. There this Court collated cases dealing with private contracts versus varying types of governmental activity and regulation, concluding, as the collated cases, that private contracts become unenforceable and inoperative in the face of governmental regulation in the public interest. The history of the *Union Dry Goods* case in the courts of Georgia and in the Georgia Commission, demonstrate that it dealt with the very issue here. The Georgia court held the contract withered in the face of the statute. The only concern was the scope of the duty which the statute gave to the Commission. No proceeding such as the Court below ordered was essential, or suggested, to abrogate the contract as precondition to the exercise of the regulatory powers statutorily enjoined.

Mobile's claim that *Union's* attack was collateral is refuted by the opinions of the Georgia Commission and the

Superior Court (App. 13, 9). But the short answer is Mobile's attack is collateral, for, at Docket G-2227, it attacked an order issued in a different proceeding at Docket G-2210 in the absence of the parties at interest in the latter proceeding. The Commission cannot achieve and exercise power by a collateral attack, it cannot exercise directly; nor may an order of an administrative agency be attacked in a collateral proceeding any more than a court judgment. Mobile not appealing pursuant to Section 19(b) from the order in G-2210 is concluded thereby.

The Act, enacted under the ample Commerce Clause power, does not admit of fragmentation, paralysis, restriction, or escape through private contracts. It follows, then, that a rate fixed in a contract is without any protection or vitality *when in conflict* with governmental regulation and is subject to be shaped in accordance with the will of the statutory provisions.

1. Considerations of individual hardship do not militate against or vary application of the commanding dominance of the statute to the private contract. Thus, claims of economic prejudice, inability to contract where private interests make contract desirable, etc., are inadmissible against the statutory scheme. They do not constitute grounds to be urged to the courts, but must be asserted to Congress.

C. The decision below ignores the express scheme of the Act, nullifies Section 4, results in judicial amendment of the statute, and produces utter chaos and confusion in its administration.

1. The holding that recourse of the natural gas company and the Commission to Section 4 is prohibited, until the contract has been abrogated in a special proceeding for that purpose, destroys the Congressional purpose and abrogates the provisions of Section 4, which this Court has called the "heart of the new regulatory system." It leaves a vacuum in the Act.

The statute places the continuing duty on the natural gas company to propose rates under Section 4(d) to hold

constant the "just and reasonable" level required by the public policy of Sections 4(a) and (b), thus depriving the natural gas company of capacity or power by contract to block or deviate the even, equal application generally. The decision below substracts the onus of initiating changes from the natural gas company, and substitutes the Commission's duty under Section 5(a), which does not permit a rate increase. The result is chaos and confusion compounded: for the natural gas company is not authorized to initiate a Section 5(a) proceeding; the distributing company, having a contract, could not be expected to; and the resulting burden on the Commission to initiate a 5(a) proceeding (which Section standing alone is inadequate to the purposes of the Act), would be overwhelming, if not impossible, in view of the Commission's other statutory duties. It follows that the decision manacles the Act by permitting contracts to frustrate its primary purposes. This destroys the uniform and monolithic "just and reasonable" of Section 4, and warrants regulation only to those isolated areas excluded from the protection of private contracts.

This unnatural result is underscored by the admission below that Section 4(e) "makes * * * plain" that in the 4(e) hearing the "dispositive question" is the justness and reasonableness of the proposed rates, but avoids the necessary consequence, i.e., their establishment, by the holding that contract existence denies Section 4 to the Commission and the natural gas company. Such reasoning champions private considerations which the parties to contracts believe promote their own interests, in preference to the injunction of Congress that the Commission should consider rates only from the public interest protection command of the statute.

Section 4(d) does not prohibit change "until first" the Commission has "a proceeding to destroy a current rate." The thirty-day notice of Section 4(d) and the discretionary judgment of the Commission, with or without hearing, that

the proposed rates are just and reasonable are adequate protection to the contract holder and others who may be affected to meet the most rigid requirements of the law. This the Court below ignored and required rejection and dismissal with refunds — all prohibited by the Act. The Court below fell into judicial legislation by this excissive handling of Section 4 for both deletion and addenda are required to accomplish the ordered result. So the Court below intruded into the "posted" legislative field of rate-making exclusively confided to the discretion of the Commission.

The holding is not helped by Mobile's contention that Section 4(d) applies only to rate modifications already agreed to to prevent change in filed rates by secret agreements. The filing and thirty-day notice of Section 4(d) prevents secrecy. Destruction of secret agreements was not the goal of Congress; rather it was by even and equal general regulation to destroy the abuses which Section 1(a) identified as required in the public interest. Secret agreements could not exist, for the only lawful rate which may be charged or paid is the filed rate. Payment or collection of any other rate would bring subjection to the heavy penalties of Section 21 of the Act.

Statutory ineffectiveness would control if the decision stands. Section 5(a) provides for hearing on complaint against a current and effective rate. The Commission after hearing must find the just and reasonable rate. It may lower the current rate to the level found, but may not raise rates to such level, for that can only be done by a filing pursuant to Section 4(d). The natural gas company cannot initiate a 5(a) proceeding. Section 5(a) contains no grant of authority to determine unreasonableness as prelude to a Section 4(d) filing. The Act stands judicially construed as entitling parties affected thereby only to that rate made specific by discretionary Commission action which proceeds upon the making of "pragmatic adjustments": not the

desires, upon whatever ground, of parties expressed in private contracts. Clearly here the decision orders the Commission to substitute for its discretionary judgment the Court's judgment as to how the Commission may proceed to find "just and reasonable," as well as what is "just and reasonable," i.e., the rate. The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 also breaches the rule that an application for increased rates may not be dismissed without a hearing. The Commission is required to violate the Act; United is deprived of its rights guaranteed by that Act.

Equally without force is the suggestion that a suspension under Section 4(e) is equivalent to the contract hearing ordered. Suspension was originally conceived to prevent effectiveness of new and increased rates pending administrative investigation of their reasonableness; not for the purpose of preserving a pending rate pending administrative determination of its unreasonableness. Right of collection, a property right, was submerged during a reasonable period in order to balance the equities and conveniences of the parties, for it was considered that the delay was not unduly violative of the property rights and yet guaranteed free opportunity for investigation. These considerations were examined at length in the debate on the Mann-Elkins Act (45th Cong. Rec. p. 3465-3472) and have been expressly approved as applicable to the Natural Gas Act. *Hope Natural Gas Co.* v. *F. P. C.* (1952, 4 Cir.) 196 F. 2d 803, 809.

The Court below also found comfort in the statement of the Congressman who introduced the amendment prohibiting suspension of indusfrial resale rates that it applied only to "short-term contracts"; but no such condition appears in the language of the Act. Such legislative history may not be used to amend the statute. *Dameron* v. *Broadhead* (1953) 345 U.S. 322.

Section 4(e) further refutes the suggestion that suspension is equivalent to the contract proceeding ordered. If

that had been the intent of Congress, industrial resale rates would have been subject to suspension and all suspension would have been obligatory, not discretionary. No difference exists in the dignity of common law contracts for resale for industrial use and domestic resale contracts. If the Court intends a difference, addenda in Section 4(e) is immediately required; if no difference be intended, the Court's reasoning would produce an invalid and unreasonable classification.

The suggestion that a filing under Section 4(d) where a private contract exists is "unilateral" and thus unlawful, was repudiated by the Fifth Circuit in *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1954) 217 F. 2d 73; 78. Compliance with the statute cannot be unilateral. Furthermore, Sections 4(d) and (e) of the Act were taken almost verbatim from the Interstate Commerce Act and must be interpreted in the light of that Act, for where provisions of one statute have been adopted by another the interpretation which has been authoritatively placed upon the former applies to the latter also. In *Armour Packing Co. v. United States*, (1908) 209 U.S. 56, this Court held that an ex parte filing of an increased rate under the Interstate Commerce Act which became effective without an administrative hearing, was the only rate that could be charged and abrogated rates fixed by pre-existing contract.

State and Federal Courts have also held that rates filed ex parte under the provisions of state public utility statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Act were the only lawful rates which might be charged, and to the extent that rate provisions of any existing contract between a utility and a consumer provided for a rate different from the rate so filed, such contract was void.

If, as seems plain, Congress intended to fill the vacuum of the gap between the producer and the distributor with a comprehensive scheme of regulation, it should not be

held that it left a hiatus by denying Section 4 applicability where there was a private contract. Mobile's contention would cut out the "heart" and leave the Act without a life-giving circulatory system. The Act is impervious to attrition by private contracts.

2. The holding that contract provisions and rights are not subject but are superior to provisions of the Act and are controlling over the regulatory scheme until found to be against public interest in a proceeding brought for that purpose is in conflict with other decisions from other Circuits:

> *Mississippi Power & Light Company* v. *Memphis Natural Gas Company* (1945, 5 Cir.) 163 F. 2d 388, cert. den. 332 U.S. 770 ("favored nation" clause for lower rates);
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> *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Company* (1949, 6 Cir.) 173 F. 2d 784, affirming (D.C.E.D. Mich. 1948) 80 F.S. 27 (Specific performance of contract provision for firm delivery volume against Commission order for ratable delivery);
>
> *Mississippi River Fuel Corporation* v. *F. P. C.* (1941, 8 Cir.) 121 F. 2d 159 (escalation clause for higher rate in filed contract);
>
> *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (D.C.E.D. Tex. 1953, unreported, reproduced R. 73-81) affirmed (1954, 5 Cir.) 217 F. 2d 73 (arising under same order of July 10, 1953, in Docket G-2210; identical with Mobile's case except *Tyler* rates were domestic and not industrial resale. Act held controlling).

The foregoing cases all stand for the proposition that rate and other provisions in contracts have no force before the Act and are subject to change and control by statutory procedures without protection of special privileges arising from "contract."

Conflict also appears with the decision of the Third Circuit in *Mississippi River Fuel Corporation* v. *Federal Power*

Commission (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988). The Commission dismissed a rate filing — precisely the act the Court here mandatorily orders. In *Mississippi* the Court held such dismissal had no color of statutory authority. There is no distinction between *Mississippi's* case and *Mobile's* case: The situation is precisely the same.

Further conflict appears in this: In *Mississippi*, the Court held the dismissal and rejection could not be supported by judicial procedures such as motion to dismiss for failure to state a claim, or motion for summary judgment, because such procedures were not expressly granted in the Act and were therefore not available. Yet here the Court orders refund by applying comparable equitable principles upon the same bases it held unavailable in *Mississippi*.

These conflicts, and particularly that with its own decision in *Mississippi*, demonstrate the accuracy and correctness of Judge Hastie's dissent.

3. The cases relied on by the Court below do not support its decision. *Wichita Railway* v. *Public Utilities Commission* (1922) 260 U.S. 48, involved a Kansas statute and its application under Kansas law. An examination of the case demonstrates that the Kansas statute was not comparable to the Act. It did not contain any provisions comparable to Section 4, which expressly authorizes rate changes. Section 13 of the Kansas statute provided for hearing upon complaint and authorized the fixing and substitution of rates even though higher — power not granted under Section 5(a).

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109, which the Court admitted "does lend some support to the position of the Commission and the intervener" (R. 145) but which it would not follow. The Missouri statute in *Midland's* case comes from the Interstate Commerce Act and contains provisions substantially similar to Sections 4(d) and (e) of the Act, whereas *Wichita* does not. *Midland* does not merely

"lend some support": it makes right the decision of the Commission.

The analogy sought for *Federal Power Commission* v. *Niagara-Mohawk Power Corp.* (1954) 347 U.S. 239, is artificial and inapposite. No private contract was posed as preventing Federal regulation. That case involved a conflict between rights claimed under a license from the Federal Power Commission with rights claimed under conveyance and title held under the State, empowered to convey. There, this Court said the statute was framed so as to preserve the very rights claimed to be destroyed by the Federal enactment. Here, Congressional intent is equally plain that the Act shall be superior to all rates reserved in contracts, and that no rate can be fixed or filed but pursuant to initiation under Section 4, or to establishment by the Commission in a 5(a) proceeding.

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac 1130; *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797; and *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.* (1924 D. C. R. I.) 295 F. 895, are all like *Wichita's* case and subject to the same inapplicability.

Arkansas Natural Gas Co. v. Railroad Commission (1923) 261 U.S. 379, is not to the purpose, for the Arkansas statute expressly provided that the Railroad Commission had no jurisdiction or power to modify or impair existing contracts for gas supply, etc.

Southern Utilities Co. v. *Palatka* (1925) 268 U. S. 232, has no connection with the issues here. It does not involve a regulatory statute or one claimed to control contract rates. It was a controversy between a city and utility to whom it had granted a franchise and involved the issue whether the utility had to comply with the franchise.

Colorado Interstate Gas Co. v. *Federal Power Com.* (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581, was a Section

5(a) proceeding instituted by the Commission on its own motion and upon complaint of certain municipal and state regulatory bodies, to determine whether current effective rates were just and reasonable. There was not involved, as here, the question of whether a Section 4 filing superseded a rate fixed in contract. Properly read, that portion quoted by the Court below means nothing more than that a private contract rate is subject to the provisions of Section 5(a) and yields when the "fact" of unreasonableness is made to appear. This is correct; but touches at no point the issues involved here. See, rather, that portion of the opinion under the heading "Application of Prices Fixed by Contract Prior to Effective Date of the Act" at p. 593, which deals with the principal applicable here.

Probably Mobile will rely upon the decision of the District of Columbia Circuit in *Sierra Pacific Power Company* v. *Federal Power Commission, et al* (1955) ..... F. 2d ....., pending on writ of certiorari Nos. 51, 53, this Term. This case arose under the Federal Power Act (16 U.S.C. 824, et seq.) Several differences between *Sierra* and this case render *Sierra* inapposite:

(a) Unlike Section 5(a) of the Act, comparable Section 206(a) of the Federal Power Act has no limitation on those who may file complaints. Thus under the Power Act the utility may file complaint against its own rate, a right expressly denied the natural gas company under Section 5(a).

(b) The contract in *Sierra* was twice approved by the California Commission on condition no loss should be passed to customers but should be assumed by stockholders. Apparently no question was raised of the jurisdiction of the California Commission to require the condition nor of its power validly to except the special contract rate from the uniform level applicable to all consumers.

(c) *Sierra* fell into the same fundamental error of the Court below in giving weight to "special circumstances",

"inducements", "new business", and like situations considered to result in equity requiring enforcement. The evidence was incompetent for the same reasons stated by the Georgia Courts in *Union Dry Goods Company* v. *Georgia Public Service Corporation* (1914) 142 Ga. 841, 83 S.E. 946; (1916) 145 Ga. 658, 89 S.E. 779, affirmed by this Court (1919) 248 U.S. 372.

In any event, such questions address themselves to Congress and not to the courts.

(d) Finally, citing *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, 251, *Sierra* held that both the contract and proposed rates might be in the "area" of reasonable rates, in which event the statute would give effect to both rates until the contract rate was found unreasonable. The *Montana-Dakota* case rejects these arguments, making plain that the only just and reasonable rate was that rate made specific by exercise of the Commission's discretionary judgment. Furthermore, it held the courts without power to assume a right to a rate other than one ordered by the Commission on the ground that in its judgment such rate was the only or more reasonable one.

In this trespass upon the exclusive discretionary province of the Commision, the Court of Appeals in *Sierra* and in this case are assuming and exercising the legislative rate-making function which the Fifth Circuit refused to do in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947) 162 F. 2d 388, cert. den. 332 U.S. 770; and *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1954) 217 F. 2d 73.

II.

The Court below in holding that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Mobile, is in conflict with the holding of this Court and of the Fourth and Eighth Circuits that under the Act the Commission has no power

to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced." Nor can it order the Commission to exercise a power not granted it by the Act upon the ground that equity countenances it, because the Commission, as an administrative body, possesses only those powers expressly granted and does not have and cannot exercise the additional powers of a court of equity to grant other and further relief, even though that relief would appear to be a reasonable or just consequence of the exercise of a granted power.

Another and fundamental lack of power to make the order exists, because the point ruled by the Court below was not preserved by Mobile in its petition for rehearing to the Commission, and thus is not subject to consideration or action by the Court below. Section 19 of the Act; *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492. Mobile's motion for rehearing specified the ground that monies collected were subject to refund should the Commission, after hearing, find all or any portion not just and reasonable (R. 39, Par. 1c; R. 43-4, Section B). The motion for rehearing contained no ground that refund under the equitable principles was proper because of an illegal filing which the Commission had no power to receive which rendered collections unlawful. Mobile expressly admitted that the Commission "had a right" to order the hearing (R. 11, Par. 10). The point reserved in the motion for rehearing was expressly stated not to be reached by the Court (R. 154). Instead, the Court below, sua sponte, held the filing void and as a Court, asserted power under familiar equity principles to order refund. This it had no jurisdiction or power to do. In addition, the Act denies such power.

Clearly, Section 4(e) gives the Commission discretion on suspendible rates to require a bond for refund; but as clearly, denies power to order suspension or refund of monies collected pursuant to rates for resale for industrial use only. This, of course, does not affect the power granted

by Section 4(e) after hearing to reduce proposed industrial resale rates pro tanto the amount found not to be just and reasonable. This phase of the holding is in square conflict with the rationale of its opinion in *Mississippi River Fuel Corp. v. Federal Power Commission* (1953) 202 F. 2d 899, (petition for cert. dism. 345 U.S. 988).

Thus since the Commission is possessed only of powers delegated by the basic Act and has no power that is inherent by virtue of its existence, it follows that the Commission is without power, and the Court below equally without power to direct exercise by the Commission of a power not delegated — power to order refunds under judicial concepts of equitable restitution.

The power of the Court on review is strictly limited to determination of whether the allowance or disallowance by the Commission is in accordance with the precept of the Act. See *State Corporation Commission of Kansas v. Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, at 184. Nor does Section 19(b) of the Act vest the Court below with power on review to order the Commission to take action not granted by the basic Act.

The cases cited by the Court are cases dealing with the age-old rule of restitution under the governing principle that where one has lost by the enforcement of a court judgment subsequently reversed, he is equitably entitled to restitution and so far as discretion deems justifiable, to have corrected what had been wrongfully done. This doctrine is applicable only to court judgments and not to orders of an administrative agency.

Mobile paid no monies pursuant to any order of the Court below, or of the Commission. It paid monies by the direction of the Act itself; for these rates being for the sale of natural gas for resale for industrial use only, the Commission had no alternative under Sections 4(d) and 4(e) of the Act save to permit the rates to go into effect at the end of the thirty-day period provided for in Section 4(d), subject to the hearing ordered. The Commission order

admitting United's filing was the simple memorandum of the performance of a mandatory act by the unambiguous terms of Section 4.

Restitution is a way whereby courts may remedy and rectify their own mistakes; not a procedure whereby courts remedy or rectify the mistakes assertedly made by other constitutional bodies. The Court below did not seek to remedy or rectify a mistake of its judgment, for no monies were paid under the compulsion of its judgment. It sought to remedy what it held to be an invalid exercise of discretionary statutory regulatory power by the Commission. The express language of Sections 4(d) and 4(e) of the Act vest an exclusive discretion in the Commission whether a proposed rate shall become effective without any notice, or upon some notice as specified, or with or without a hearing. The statutory language is "may"; not the obligatory, "must". Such options are addressed to exercise of quasi-legislative functions by the Commission. If it be assumed that the mandatory order was erroneous, it was error in the quasi-legislative field and not the mistake of a judicial body vested with power to exercise the doctrine of restitution. The decision is an encroachment upon the legislative function and also constitutes an attempt, without historical or logical basis, to extend into the administrative legislative field concepts clearly applicable only in court proceedings.

Research has produced no instance of a federal court directing an administrative agency to require restitution under similar circumstances. Congress, having initially denied the Commission power to order reparations, the courts may not achieve the same result by the simple expediency of adjudicating as "void" an order mandatory by the basic Act.

Argument

I.

All rates provided in private contracts and provisions respecting the service to be rendered are inferior to the

Rate Regulatory Power under the Act, and are unenforceable against the paramount right and power of the Commission to fix and determine just and reasonable rates, as well as the duty of the Natural Gas Company under Section 4 of that Act to initiate just and reasonable rates, and such rates, whenever so initiated by the Natural Gas Company and permitted by the Commission to be filed, supersede and replace, by operation of law, such contract rates.

A. The Design Of The Act Confirms This.

Section 1(a) of the Act shows that Congress, in identifying the public interest which required regulation, was dealing with the problems laid before it by the report of the Federal Trade Commission.[11]

The transmission was the famous "gap" which it was the purpose of the Congress to regulate. See *Missouri v. Kansas Natural Gas Co.* (1924) 265 U.S. 298; *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927) 273 U.S. 83; *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, (1947) 332 U.S. 507. Clearly it was the intent to exercise the power of the Commerce Clause for complete preemption of the regulated area.

The Act in Section 4(a) requires that "all rates and charges * * * *shall be* just and reasonable," and declares "any" rate or charge not "just and reasonable" to be "unlawful." Section 4(b) prohibits the natural gas company

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[11] Investigation pursuant to S. Res. No. 83 70th Cong. 1st Sess. approved February 15, 1928 as extended by S. J. Res. No. 115, 73rd Cong. 2d Sess. approved June 26, 1934; final report of the Federal Trade Commission to the Senate being S. Dock. No. 92, 70th Cong., 1st Sess. This report recognized the division of the industry into producing, transmission and distributing. The problems and evils covered by the report were alleged to exist because of the position and practices of the interstate transmission companies stated to control the "vital line of transportation" between the producer and the consumer; that the transmission was one of the most competitive situations to be found involving commodities or public utility service (p. 112) so that an "interstate monopoly" was enjoyed (p. 113); and pointed out that states were unable to regulate because of Supreme Court decisions holding that under the Commerce Clause such transactions were not subject to state regulation (p. 613, 614).

from making any unreasonable difference in rates "or in any other respect," either as between localities or as between classes of service. The Act contains no language of exception or modification to these declarations of public policy. In completely occupying the "gap" Congress was not derelict to create a "gap" by leaving the regulated utilities free to execute contracts which would deviate, even prevent, regulation as could be done under the decision below.

In evaluating the Congressional purpose and intent, it is significant that the Act nowhere gives any customer, purchaser, or contractee, authority to propose or initiate rates; but the natural-gas company has the mandatory duty to charge only just and reasonable rates; and exclusively under Section 4 to propose and initiate changes. *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 U.S. 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 U.S. 246; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287, reversed on other grounds 320 U.S. 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 U.S. 515. In the first case the Fourth Circuit said:

> "One of the most important duties of a public utility inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions * * *". (p. 567).

The pronouncement of the foregoing decisions merely confirm the view expressed in the House Report on the bill which became the Act; "Subsection a (i. e., Section 4(a).) imposes upon natural gas companies the duty of charging just and reasonable rates * * *."[12]

[12] Hearings on H.R. 6586, H. Report 709 to accompany H. R. 6586, 75th Congress, 1st Session.

On the contrary Section 5(a) requires a hearing and is upon complaint against a filed and currently applicable rate. If the Commission elects to have a hearing under Section 4(e) its powers there are the same as the powers it exercises under Section 5(a). *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *State Corporation Commission* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, 183. In assaying the Act, this Court said:

> "The Federal Power Commission was given broad powers of regulation. The fixing of 'just and reasonable' rates (Section 4) with powers attendant thereto was the *heart* of the new regulatory system." Federal Power Commission v. Hope Natural Gas Co. (1944) 320 U.S. 591, 611.

Evaluating those "broad powers of regulation," this Court said that Congress had entrusted its administration to the Commission, not to the courts, thus apart from the requirements of judicial review, "it is not for us to advise the Commission how to discharge its functions" (p. 618).

Thus Congress proposed a comprehensive scheme of rate initiation and regulation that set uniform application to all alike, was by its very language and design wholly exclusive and inclusive, and obviously was intended to supersede and replace all other rates however made or agreed.

The hearings leave no doubt that the Congress intended the scheme of the Act to replace every other device including contract provisions, for in no other way could the exclusive integrity of the statutory scheme be inviolably preserved.[13]

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[13] The following excerpts are from the testimony given by Mr. DeVane, then Solicitor of the Federal Power Commission, before the Congressional Committee, Hearing before House Committee on H.R. 11,662, 74th Congress (2d Sess.) from pages 28-29:

> "MR. LEA: Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure?
>
> MR. DeVANE: In the beginning?
>
> MR. LEA: Yes.

careful examination of the hearings quoted in the opinion below (R. 149-150) clearly does not support but makes against the conclusion drawn therefrom in support of the holding. They show that the quoted colloquy revolved around a contract situation classic to the policy stated in Section 1(a). The complete exchange shows aggressive support by the Illinois Commerce Commission of the Act which, pursuant to Section 5(a), would permit regulation and control of the contract.[14] With equal clarity they demonstrate that the

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MR. DeVANE: The Companies would simply file their schedules.

MR. LEA: And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?

MR. DeVANE: Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company, as provided in Section 4, or by the Commission after hearing.

MR. LEA: There would be, I take it, no duty upon the Commission under this Bill in the absence of complaint or just reason to call for interference to establish rates.

MR DeVANE: No, sir; the Commission can only establish rates after investigation and hearing.

Now, that investigation can be undertaken under Section 5 of the bill; either on the Commission's own initiative or upon complaint.

* * *

MR. COOPER: And anyone who wants to file a complaint goes to the Commission; is that right?

MR. DeVANE: That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4(d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of five months."

[14] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, First Session, on H.R. 4008, March 24-25, 1937:

At Page 24: Harry R. Booth is identified as "Acting counsel for the Illinois Commerce Commission" regulating intra-state rates in Illinois.

At Page 24: Mr. Booth states enactment necessary to control inter-state wholesale rates, otherwise people in Illinois might be compelled to pay in the ensuing ten years from 20 to 35 million dollars in excessive charges to Natural Gas Pipe Line Company of America.

At Page 25-27: Mr. Booth traces the organization, growth, and corporate connection of Natural Gas Pipe Line Company of America, and details litigation in Federal Courts, in which the Illinois Commission was seeking information on the rate structure of Natural Gas Pipe Line Company as an aid to regulation of intra-state activity.

At Page 27-32: Is set forth the bill of complaint for injunction of Natural Gas Pipe Line Company of America against the Illinois Commerce Commission and the Attorney General of Illinois in the United States District Court for the Northern District of Illinois, which bill is based upon the assertion that the Illinois Commission

colloquy had no bearing whatever upon Section 4, or whether a filing under Section 4(d) would supersede and replace a private contract rate. Under the comprehensive scheme of the Act that particular Company would have been required under Section 4(c) to file as its initial rate schedule the contract involved in the colloquy, following which the Illinois Commerce Commission could have complained only pursuant to Section 5(a) of the Act.

This Court again declared the utter lack of power in the courts in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251, by saying:

> "But the prescription of the statute is a standard for the Commission to apply, and, independently of Commission action creates no right which courts may enforce."

and that the only legal rate was the filed rate and that "not even a court can authorize commerce in the commodity on other terms," for "the right to a reasonable rate is the right to the rate which the Commission files or fixes, * * *"

Light on this problem is had from *Armour Packing Company* v. *United States* (1908) 209 U.S. 56, which arose under the Elkins Act Amendment to the Interstate Commerce Act from which this Act is in direct descent. The contract was made at the then filed and published legal rate. Thereafter a different rate was filed. The claim that the law did not expressly destroy the right of contract was rejected for the Court said this lost sight of the "central and controlling purpose" which required "all shippers" treated alike, and but *one* rate and *that* "the filed and published rate, equally

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is without power to reach the interstate activities of the complainant; i.e., a suit behind the shield of the "gap" which it was the design of the Act to occupy.

At Page 33-42: After discussion between Mr. Booth and members of the Committee on various phases of the proposed bill, Mr. Halleck brought the question back to the 15-year contract of the Natural Gas Pipe Company, following which the colloquy referred to in the opinion (R. 749-150) occurred. Thus the colloquy relied on could only refer to an existing contract, and not to a change in rates under Section 4(d).

known by and available to every shipper" (p. 80). The Elkins Act prohibited the giving and receiving of transportation at less than the published rate, and the Court noted that the one rate fixed and required by the statute was subject to change "in the only way open by the statute." Thus, if rates were subject to alteration by special agreement, the statutory purpose would fail and one rate would not be established "known to all and from which neither shipper nor carrier may depart." The Court summed up:

> "It has provided for the establishing of one rate to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abusive unequal rates which it was the design of the statute to prohibit and punish" (p. 81).

Here, the Act required the charging and collecting only of just and reasonable rates and made all other rates illegal (Section 4). The sole touchstone of just and reasonable is that rate which is made specific by the Commission. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251; *Cities Service Gas Co.* v. *F. P. C.* (1946, 10 Cir.) 155 F. 2d 694, 698-9, cert. den. 329 U.S. 773.

To the complaint that *Armour's* construction and holding would put the shipper at the mercy of the carrier, who could arbitrarily change the rate upon the faith of which contracts had been entered, the Court gave the short answer that Congress had the inherent power under the Interstate Commerce Clause to make such regulations, and "* * * such considerations, inconvenience and hardship address themselves to the law-making branch of the Government" (p. 82). The Court then concluded that if a shipper saw fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to any possible change in the published rate in the manner fixed by statute.

Thus the Court considered and repudiated the claim that the contract had standing against the statutory requirement for it reasoned that the destruction of the contract was necessary to give vitality to the prohibitions of the Act (compare Sections 4(a) and (b)) and that the parties could not acquire the power during the life of the contract "to continue to execute it, although a violation of the act to regulate commerce might arise from doing so" (p. 83).

The Court here sought escape from the philosophy of *Armour* by reasoning that it was inapposite, because neither the Elkins Act nor the Interstate Commerce Act permitted contracts to be filed[15]. The attempted distinction is not to the purpose. The rationale of *Armour* was to emphasize that where the Congress under the Commerce Clause established regulation intended to be uniform and applicable to all alike, no arrangement, not even a private contract unmentioned in the Act, could be permitted to stand in the way of the regulatory intent of Congress in its enactment. So here Congress intended and stipulated that all rates other than just and reasonable rates were unlawful. It expressly provided for contract inferiority by subjecting contracts to the changes and procedures of Sections 4 and 5. The Act leaves no room for doubt that the regulation intended was even and uniformly applicable to all alike. The Natural Gas Act comes from the Interstate Commerce Act and must be held to have the gloss that was inherent in the Interstate Commerce Act. Cf. *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803. The language of Sections 4 and 5, both of which expressly permit changes in contracts undercuts the attempt to distinguish *Armour*.

Furthermore, the context of contract versus regulation was already set in this respect, for before *Armour* it had been established that a public utility was without capacity

[15] R. 150 FN 10. Mobile sought escape in the same position (Br. in Opp. p. 7-8).

to make a contract that would have effect to restrict or interfere with its compliance with statutory requirement, because such would be against public policy. See *Gibbs* v. *Consolidated Gas Co.* (1899) 130 U.S. 396. Shortly after *Armour* came the decision in *Producers Transportation Company* v. *Railroad Commission of California* (1919) 251 U.S. 228, which announced that the regulatory power was superior to a filed and approved contract because the exertion of the regulatory power cannot be "prevent[ed] or postpone[d] by contracts for future transportation."

B. Mobile's contract was made and held subject to the exercise by Congress of its power under the commerce clause and its contract provisions for rates conflicting with the filed rates, which are the only legal rates tolerated by the Act, must yield to and be replaced by such filed rates, for Mobile cannot remove such rates from the statutory initiation or regulation stipulated by Congress in the Act by making a contract about them.

The relative weight of private contract against governmental or public regulation in the public interest has long been settled. In *Union Dry Goods Company* v. *Georgia Public Service Corporation* (1919) 248 U.S. 372, all of the leading cases on the issue of contract versus public statutory regulation were reconsidered and recapitulated.[16] There, a contract dated July 18, 1912, stipulated for rates for electric light and power service for five years; a subsequent order by the Railroad Commission of Georgia increased rates and declared all contracts in conflict therewith to be illegal. The classic claim was made of impairment

[16] *Manigault* v. *Springs* (1905) 199 U.S. 473, 480; *Hudson County Water Co.* v. *McCarter* (1908) 209 U.S. 349, 357; *Louisville & N. Ry. Co.* v. *Mottley* (1911) 219 U.S. 467, 482; *Chicago B. & Q. Ry. Co.* v. *McGuire* (1911) 219 U.S. 549, 567; *Atlantic Coast Line Railway Co* v. *Goldsboro* (1914) 232 U.S. 548, 558; *Rail and River Coal Co.* v. *Ohio Industrial Commission* (1915) 236 U.S. 338, 349.

of contract obligation and deprivation of property without due process. This Court rejected those contentions, collating and quoting from numerous of its decisions to demonstrate how well settled such questions were. It was declared that contracts had to yield to public regulation, otherwise they would be superior to and defeat the very purpose of the regulation. Liberty of contract was held to imply absence of arbitrary restraint, not immunity from reasonable regulation. All contracts had to be understood as being made in reference to the exercise of the rightful authority of the Government. In fact, the statute itself was imported into the contract and thus the provisions of Section 4 relating to change by the natural gas company were imported by law into the terms of Supplement No. 10 to Supplement No. 7, the contract Mobile seeks here to enforce above regulation.[17] The question was aptly put in *Hudson Water Company* v. *McCarter* (1908) 209 U.S. 349, where in discussing the conflict between private right of property and the state's exercise of its sovereign and constitutional power, such as police power, the Court said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are

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[17] The general tenor of the decision below seems to turn on the declared absence of express interdiction of contracts by the Act. Apart from the language of Section 4(d) which expressly authorizes change and superseding of contract by filing, the philosophy in the *Legal Tender Cases* (1871) 12 Wall. 457, 20 L.Ed. 287, seems sufficient. There it was also claimed that the contract was preserved because there was no express condemnation, but this Court, rejecting, said:

> "It is, then, clear that the powers of Congress may be exerted, though the *effect* of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution or in any of the decisions of this Court" (p. 550; 312).

Though no constitutional issue appears here, the quotation merely emphasizes the applicability of the language. Clearly Congress stipulated for the statutory regulation irrespective of the hurt that would result to those in the way of the statute.

other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

"* * * But it is recognized that the state as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of land most immediately concerned." (p. 355).

In considering the evils the Act was designed to contain, Congress declared only a "just and reasonable" rate should be allowed; vested the Commission as administrator with unlimited and undefined discretion to determine what is "just and reasonable"; and denied to all persons, save only the natural gas company, the continuing duty and right to propose for Commission consideration such rates. This was the part of wisdom, for surely the natural gas company is best qualified to evaluate its own necessities in initiating rates that would be just and reasonable for its operations and thereby conform to the declared governmental policies of Sections 4(a) and 4(b). The procedures and discretions of Sections 4 and 5 insured over-all supervision by the Commission guaranteeing integrated equality of regulation to all.

This Congressional policy makes fundamental and automatic the rejection of the contract rate save during that time that the contract rate is the current filed and legal rate. The Commission's overriding duty only to permit; and the natural gas company's recurring obligation always to propose "just and reasonable" rates can brook no restraint. *Tyler Gas Service Co. v. United Gas Pipe Line Company* (1954, 5 Cir.) 217 F. 2d 73.

The Court below adopted Mobile's contention that the rule of *Union Dry Goods'* case is good only in collateral attack, but the position is without force, for that is to say

that it lies within the power of private parties by their choice of action or inaction to vest Congress and the Commission as its statutory agent with power. The authority of Congress stems from its interstate powers; effective control from the exercise of that power becomes active whenever and wherever the unfettered application of that exercise is challenged or in collision. Hence, all contracts even though made before enactment are made subject to, and powerless to defeat, exercise of the paramount governmental right. *Louisville & N. Ry. Co.* v. *Mottley* (1911) 219 U.S. 467, 482; after enactment, (as in Supplement No. 10 here), the statute is imported into and controls the contract. *Vieth* v. *Sixth Ward Building & Loan Assn.* (1940) 310 U.S. 32. It follows that the statute is at all times the complete master of the contract.

The short answer to Mobile's claim that *Union* was a collateral attack is that Mobile's attack is collateral. Mobile at Docket G-2227 attacked an order in another proceeding at Docket G-2210; the parties were not the same, the proceeding was a different one; there was no other relief sought than the mere setting aside of the order of July 10, 1953 at G-2210, i.e., the substitution of language and the inclusion of new decrees. The decision below does not revise the order of July 10, 1953, in Docket G-2210; it requires an order entered at G-2227 changing and emasculating the order entered at Docket G-2210. Manifestly the Commission cannot possess power to achieve by collateral attack what it cannot do directly. Furthermore, an order of an administrative agency may not be attacked in a collateral proceeding any more than the judgment of a court may be so attacked — the proper remedy being a direct appeal from the administrative order.[18] Mobile, not having perfected a review of the order of July 10, 1953, in Docket G-2210

[18] *Steele* v. *St. Louis Smelting & Refining Company* (1882) 106 U. S. 447. Held that in an action by patentee's assignee against a third party, a grant of patent by the Land Office was not subject to collateral attack on the

under Section 19(b), said order became final and conclusive. *Sunshine Anthracite Coal Co.* v. *Atkins* (1940) 310 U.S. 381; *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1953, D.C.E.D. Tex., unreported) R. 73, affirmed (1954, 5 Cir.) 217 F. 2d 73.

Union Dry Goods' case decided the question here against Mobile. The appendix filed with this brief contains the opinion of the Railroad Commission of Georgia in the proceeding out of which that case grew (App. 13). This opinion, entered upon the application of the *Macon Railway & Light Company*, recites that the holding company owning the Macon Railway & Light Company had also obtained control of the Georgia Public Service Corporation, defendant in *Union's* case (App. 18-19). Because of common ownership and in the interest of the public, the Georgia Commission held the hearing in the *Macon* case rather than the *Georgia Public Service Corporation* case, stating it would prescribe "just and reasonable rates for the older and larger company" (App. 21-2) and would thereafter "in a separate order" prescribe the same rates for Georgia Public Service Corporation.

The opinion analyzed under applicable headings the evidence received and investigation made, reflecting merely a customary administrative proceeding to determine rate base, plant account, rate of return, etc. for normal rate-making. Finally, under a topic "Special Contract Rates,"

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ground that the patentee had fraudulently obtained the patent.

Adams v. *Nagle* (1937), 303 U. S. 532, where an administrative officer's determination that a bank was insolvent and ordering an assessment against stockholders was held not subject to collateral attack in an action by the receiver of the bank to enforce assessments against stockholders. To the same effect see *Davis Trust Company* v. *Hardee* (1936, D.C. Cir.) 85 F. 2d 571.

LaRoche v. *Jones* (1850), 9 How. 155, 13 L. Ed. 85.

State v. *Stevens* (1916) 78 N. H. 268, 99 A. 723. Held that the refusal of a State insurance commissioner to license appellant to sell lightning rods could not be attacked collaterally on appeal from conviction for selling without a license. Certiorari would have been the proper remedy.

in this opinion *relating only to the Macon Railway & Light Company*, the opinion declares:

> "The Commission has given careful consideration to the *contentions* of counsel for firms and individuals holding term contracts made at the rates now in effect, that they should stand and be carried out by the Company" (App. 43).

This portion of the opinion (App. 43-4) was pled and is set out in the record in this Court in the *Union Dry Goods Company* case.[19] All special rates, whether in the form of contracts for definite periods or other form, were declared to be illegal. It is thus evident from the Commission's opinion, as United urged below, that it took no evidence as to illegality or as to whether such contracts were against the public interest. It simply took normal evidence on plant, expenses, etc. for the fixing and establishment of just and reasonable rates; and having found those rates declared all other rates, whether in contracts or otherwise, to be illegal. Thus, the opinion shows that a hearing on contract unreasonableness which the Court below ascribed to *Union's* case was not had, and on Georgia Public Service Corporation with which Union contracted, no hearing at all was had. There was no collateral attack. The decision turned on a point of law. The statute was held impervious to contract infiltration.

Also in the appendix to this brief (App. 9) is the opinion of the trial judge denying injunction in *Union's* case. This discloses no assertion that contracts, being superior, were invulnerable to overriding statutory regula-

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[19] The section of the Georgia Commission opinion headed "Special Contract Rates" appears at p. 40-1 as "Exhibit 'B'" in the record in this Court of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, No. 87, October Term 1918, (25,660). The same extract in its context in the Georgia Commission opinion appears herein (App. 43-4). Comparison shows that in copying the section in the record of the case in this Court several errors were made, two or three being of substance. Thus the text of the Appendix is more correct.

tion; but rather that statutory invalidity destroyed power to regulate thus exonerating pristine integrity of contracts.[20] Thus there was no question of collateral attack; there was question of lack of power.

The opinion of the Supreme Court of Georgia, on the injunction appeal 142 Ga. 841, 83 S.E. 946, confirms this. It proceeds to decision upon a point of law based upon the power of the Georgia Commission under the statute, and does not at any place suggest that hearing is necessary

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[20] From trial court's opinion in *Union's* case:

"The plaintiff concedes that if the Railroad Commission has power and authority to fix rates at which electricity may be furnished by companies and corporations engaged in manufacturing and transmitting this useful agency, and to adjudicate contracts already made to be discriminatory, and to order them abrogated, though thereby the consumer will be injured and the electric company benefitted, then the defendant has the right and power, under the orders of the Commission passed in this case, to treat the contract of July, 1912, as abrogated, as of March 1st, 1914. In other words, the plaintiff concedes that unless the order of the Railroad Commission be treated by the Court as void and of no effect, insofar as it orders this contract, and all others similar thereto to be abrogated, it is impossible for this court to grant the prayers of the petition.

"The petition, therefore, attacks the act of 1907 by which the General Assembly undertook to extend the powers of the Railroad Commission so as to take in the control of the electric light and power companies, telegraph and telephone companies, street railroad companies, and other public service companies, enumerated in said act. It denies the constitutionality of this act. It also denies that the act, can if constitutional, confer upon the Commission the right to regulate rates, and prevent discriminating rates. It also specially denies the power of the Commission to abrogate a contract already legally made, between a Light and Power Company and a consumer, alleging that such power impairs the obligation of a contract, and virtually is an ex posto facto law as to contracts." (App. 9-10.)

The Georgia Statute under which the Commission acted in *Union's* case is set out at p. 8-9 of the brief of the Union Dry Goods Company in that case, No. 87, October term, 1918 (25,660), and is as follows:

"The Act of 1907 of the Georgia Legislature, p. 74, Section 5, by virtue of which the Railroad Commission claimed authority to pass its order abrogating the contract of the plaintiff is as follows:

'Sec. 5. Be it further enacted by the authority aforesaid, That the power to determine what are just and reasonable rates and charges is vested exclusively in said commission. The printed reports of the Railroad Commission, published by its authority, shall be admissible as evidence in any court in Georgia without further proof and the schedules of rates made by the Commission and any order passed or rule or regulation prescribed by the Commission shall be admissible in evidence in any court in Georgia upon the certificate of the secretary of the commission. The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies or persons owning, leasing or operating street railroads

on the contract. It proclaims that the contract withers and becomes inoperative before the regulation.[21]

The Commission opinion was stated to be in *Macon's* case, but, the Court said "as it referred to the schedule of rates applicable to all public service companies for power and lights supplied in the City of Macon, we deem the opinion as relating to the order fixing the schedule of rates."

On the merits the Union Dry Goods Company offered evidence, comparable to Mobile's allegations in its petition to review surrounding the making of the contract, and of a class with that the Commission apparently received in *Sierra Pacific Power Company* v. *Federal Power Commission* (1955 D.C. Cir.) ..... F. 2d .....[22] The evidence in

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in this State; *provided, however,* that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that this Act shall not operate as a repeal of any existing municipal ordinance; nor shall it impair nor invalidate any future contract or ordinance of any municipality as to the public uses of such company that shall receive the assent of the Railroad Commission; over docks and wharves and corporations, companies, or persons owning, leasing or operating the same; over terminals or terminal stations and corporations, companies or persons owning, leasing or operating such; cotton compress corporations or associations, and persons or companies owning, leasing or operating the same; and over telegraph or telephone corporations, companies or persons, owning, leasing or operating a public telephone service or telephone lines in this State, over gas and electric light and power company corporations or persons owning, leasing or operating public gas plants or electric light and power plants furnishing service to the public.'".

[21] The crux of its decision is as follows:

"At common law, if a public service corporation served all at reasonable rates, it performed its obligation, but modern industrial conditions demand the further requirement that it shall serve all with equality. They are usually clothed with the power of eminent domain, and this attribute of sovereignty converts them into quasi public institutions; and hence it has become the accepted modern doctrine that public service companies must not only serve the public at reasonable rates, but shall also serve the public efficiently and without discrimination. * * * Manifestly, the public health, progress, morals, and general well-being of a municipality cannot be bound up in a contract with a few individuals. Hence we think that when the Railroad Commission prescribed a reasonable rate for electrical lighting and power companies, the rate thus established had the effect of overriding the contractual rate between the public service company and its patrons, made anterior to the Commission's order" (p. 948).

[22] Pending on writ of certiorari Nos. 51, 53, this Term.

Union's case was excluded by the trial court as being irrelevant.[23] No evidence was offered to show that the rates established by the Commission were themselves unjust and unreasonable. Looking to the future, as it should, the Georgia Supreme Court, affirming, considered the critical examination of the "now and hereafter" to be controlling.[24] The objective was justness and reasonableness under present and reasonably foreseeable conditions; not the abstruse inquiry whether actions taken and facts existing at past times were supported by conditions then existing — considerations impractical to the statutory goal. That should have been the milieu of consideration by the majority below for such is the absolute command of the Act (See Footnote 21, p. 42 herein).

Summing up, the statute of Georgia, like the Act here, prescribed and empowered the Georgia Commission to fix and establish just and reasonable rates. That Commission established maximum rates which the Georgia statute permitted the utility to charge. The Supreme Court of Georgia held that the legislative act in fixing rates in accordance with the statutory scheme rendered those rates immune to any restriction by outstanding contracts and that rates so fixed superseded contracts. That precisely is the point here; that precisely was the point which this Court affirmed and approved in its opinion in *Union's* case. Variation in

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[23] See Bill of Exceptions on exclusion of proffered testimony of witness W. J. Massie, and trial court's ruling sustaining objection. Pages 12-13 of Transcipt of record in Cause 87, October Term, 1918 (25,660), Records of the Supreme Court of the United States.

[24] In a syllabus prepared by the Supreme Court of Georgia on appeal on merits, that Court said:

> "Evidence that at the time of making the contract the parties acted in good faith, and that the contract was made at the solicitation of the Public Service Corporation, which was also making similar contracts with other customers in the city at lower rates than those made with plaintiff, and that the conventional rate paid by the plaintiff afforded the Public Service Corporation a fair and reasonable profit for the service and electricity furnished, was insufficient to overcome the presumption that the rates prescribed by the Railroad Commission, more than a year after execution of the contract, were reasonable" (145 Ga. 658, 89 S. E. 779, at p. 779).

the mode of primary source, police power versus Commerce Clause power, does not affect application of the doctrine.

These considerations, then, indicate the full breadth and sweep of the overriding power of Congress under the Commerce Clause to protect its exercise of that power against amputation, restriction, fragmentation, or escape through private contracts. The rate fixed in a contract, as shown, is without any protection or vitality *when in conflict* with governmental regulation, nor should it be. The claim of "void ab initio" is not to the purpose; it is mere defensive deviation.

1. Hardship, Such As Mobile Urges, Does Not Militate Against Or Vary Application Of The Foregoing Rule.

Mobile claims that if the Commission be correct, and if its contract be held inoperative: (1) Mobile cannot obtain an order of refund should the Commission approve rates at a lower level than proposed; (2) that no contract to sell natural gas at a special rate for a particular purpose could be had;[25] and (3) that under its contract with Ideal Cement it is required to sell gas at a price lower than the increased rates filed by United.

The law is well settled that such claims of hardship do not make against the valid exercise of governmental authority, are not grounds to be urged to the courts, but must be asserted, if at all, in the proper legislative forum. *Louisville & Nashville Railway Co.* v. *Mottley* (1911) 219 U.S. 467; *Armour Packing Co.* v. *United States* (1908) 209 U.S. 56; *Kiser* v. *Central of Georgia Railway* (1916, D.C.S.D. Ga.) 236 F. 573, affirmed 239 F. 718; *Colorado Interstate Gas Co.*

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[25] Below Mobile at Br. p. 9 said: "* * * for it was contemplated at the time the contract was entered into that the rate should be subsantially less than United's general rates to other customers." United denies the statement; but the statement would admit a contract unlawful and illegal because in violation of Sections 4(a) and 4(b) of the Act.

v. Federal Power Commission (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.* (1933) 289 U.S. 266.

C. The decision below ignores the express scheme of the Act, nullifies Section 4, Results in judicial amendment of the statute, and produces utter chaos and confusion in its administration.

1. The Nullification Of Section 4.

The holding that a natural gas company shall not exercise its rights and perform its duties under Section 4, nor shall the Commission permit it, so long as there is a contract between the natural gas company and its customer, until such contract has been abrogated and set aside in a proceeding to determine whether the same is contrary to the public interest: destroys the Congressional purpose and nullifies the provisions of Section 4. This Court is thus for the first time presented with the question of whether Section 4 of the Act which it has called the "heart of the new regulatory system"[26] establishes a comprehensive, exclusive scheme of regulation which provides that change in rates filed by the natural gas company pursuant to Section 4(d) and permitted by the Commission to become effective as the filed rate pursuant to the provisions of Sections 4(d) and 4(e) is superior to and supersedes rates fixed by private contract theretofore filed with the Commission as a rate schedule.[27]

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[26] *Federal Power Commission* v. *Hope Natural Gas Company* (1944) 320 U.S. 591, 611.

[27] Perhaps the closest approach to this question is in *Pennsylvania Water & Power Co.* v. *Federal Power Commission* (1952) 343 U.S. 414, a Section 5(a) type proceeding upon the complaint of the Maryland Public Service Commission and others empowered to make the 5(a) complaint against rates contained in a contract filed as a rate schedule under the Federal Power Act (p. 423). The Commission ordered Penn Water to file schedule of reduced rates in accordance with its order. Penn Water appealed on the ground that the Commission order required it to comply

By the statute, the natural gas company is obligated to initiate rate changes for Commission consideration pursuant to Section 4(d) as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be "just and reasonable;" by the decision below, the onus is taken from the natural gas company and placed on the Commission to institute a proceeding against such contract filed whenever and as often as necessary to meet the obligation of Sections 4(a) and 5(a) of "just and reasonable" rates. All rates charged or services rendered subject to Commission jurisdiction are necessarily by contract, whether a common law contract such as Supplement 10 to Supplement 7 here or not. Thus the sweep of the decision below destroys all duties and rights of the natural gas

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with a contract void because in violation of the Federal anti-trust laws. In litigation then pending, the Fourth Circuit held the contract in its entirety invalid and unenforceable for such violation. See *Pennsylvania Water & Power Company* v. *Consolidated G. E. L. & P. Co.*, 184 F. 2d 552, cert. den. 340 U.S. 906. This Court said:

> "To the extent that *Penn Water* is being controlled it is by the Commission, acting under statutory authority, not by Consolidated, acting under the authority of private contract terms 'legalized' by the Commission. The duty of *Penn Water* to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts." (p. 422).

This view that the statutory act, not the contract, is controlling is in conflict with the view expressed below. Further this Court said:

> "Section 205(d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Here instead of following the procedure for changing existing services and practices — a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own — the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order" (p. 423-4).

The Court in pointing out that the proper course for relief of *Penn Water* was to utilize the prescribed procedures of the statute rather than to attack the contract qua contract did not express or suggest reservations such as the decision below relies upon. It seems inherent in the Court's approach in *Penn Water* that the contract as such had no standing so that the compulsion arose from the fact of the Commission's order, it being coincidence that the order paralleled the contract. It is submitted that is the only reasonable rationale here.

company to initiate change in rates; deprives it of Section 4; produces a vacuum in the Act respecting this duty; and substitutes for it the Commission's duty under Section 5(a) which does not permit an increase in rates. This is an intolerable burden which the Commission clearly is not prepared to undertake.

As Congress wrote the Act, the natural gas company does not have capacity or power by private contract with its customers to prevent the comprehensive exclusive regulation provided by the Act; but as re-written by the decision below, the natural gas company may make contracts which for all practical purposes remove it from regulation under the Act. Examination discloses nothing in the climate of decisions under the Act congenial to cultivation of the notion that Congressional regulatory preemption declared in Section 1(a) of the Act to the area between the producer and the distributer was applicable only to those areas which the utility and its customer deigned to exclude from their private contractual arrangements. The very claim is repugnant to the manifest intent of the Act.

The effect of the decision, thus, is to hold that the regulatory authority under the Act is decimated with divisive islands above the regulatory level created by private contracts. Regulation is reduced from the uniform and monolithic "just and reasonable" of Section 4 applicable to all alike to piecemeal regulation of individual natural gas companies, insofar as they have operational activities free from private contracts. The natural gas company cannot initiate a 5(a) proceeding; the distribution company, assuming a contract, could not be expected to; and the consequent burden on the Commission to initiate a 5(a) proceeding would be overwhelming, if not impossible, when considered in the light of the volume of the Commission's statutory activities.[28]

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[28] The resultant confusion and futility which would result from displacement of the statutory scheme of regulation may be measured by the present

The holding below is in the teeth of the plain language of Section 4(d) that "no change shall be made *by any natural gas company* in any such *rate* * * * or *contract* relating thereto, *except* after thirty days' notice to the Commission *and to the public*." The 4(d) phrase "any such rate * * * or contract" clearly refers to the language in 4(c) which permits rates and charges "together with all contracts which in any manner affect or relate to such rates, charges" to be filed as rate schedules with the Commission. These two sections are governed by and inseparably connected with the Congressional declaration of public policy in Sections 4(a) and (b) requiring all rates to be "just and reasonable," rendering unlawful all rates not "just and reasonable," and insuring uniformity of "just and reasonable" by outlawing any differences, preferences, or advantages between localities or classes of service. Thus the Commission's administrative duty under the Act, and particularly Section 4, is statutorily confined to the ever recurring and continuing duty of "just and reasonable" prospectively; not to the sterile and negative determination of "unreasonableness" as the key to unlock performance of the duty enjoined by Congress upon the natural gas company and the Commission in Section 4. Yet the decision unnaturally subverts the statutory injunction, for while it admits that Section 4(e) "makes * * * plain" that in the 4(e) hearing the "dispositive question * * * is whether the increased rates are just and reasonable" (R. 143), it fails to recognize the unavoidable consequence, (i.e., establishment of the new rates if found just and reasonable) by the holding that contract existence denies the provisions of said Section to the Commission and the natural

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extension of the Commission's rate regulatory jurisdiction to independent producers. Commissioner Digby, in his dissent to the Commission's order No. 174-A issued on August 6, 1954, estimates as a minimum that the Commission would be required to consider 6,000 contracts. This in addition to the sales contracts under rate provisions of that order, and in addition to the normal jurisdiction of the Commission over transmission pipe line companies.

gas company. The blunt answer is that Congress did not so stipulate. The making of private contracts is influenced by numberless considerations, whether stated or intimate, which the parties thereto conceive will promote their own interests; yet the Commission, as the statutory agent of Congress, in permitting contract rates, or any other rates, to be filed and become effective can consider them solely from the "public interest" command of the statute (Section 1(a); Sections 4(a), (b), (d), (e)). Private considerations, however momentous to the parties, are irrelevant to the Commission's duty.

Only the natural gas company is authorized to initiate change in an existing rate. In fact, it is the duty of a natural gas company to propose such changes.[29]

Section 4(d) does not, as the decision below held, prohibit a change "until first" the Commission has a "proceeding" to destroy the current rate. It expressly contemplates change and modification in contract rates without a proceeding against current filed rates; for it forbids change by the natural gas company in "contract[s]" only where the thirty days' notice is not given. In other words, Section 4(d) expressly declares that "contracts" relating to rates shall be subject to change by the filing (and giving thirty days' notice) by the natural gas company. This notice is

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[29] The Supreme Court of Pennsylvania, dealing with provisions of the Public Service Company Law of 1913, which is substantially similar to Sections 4(d) and (e) of the Act, said in *Coplay Cement Manufacturing Company* v. *Public Service Commission* (1921) 271 Pa. 58, 114 Atl. 649, 651:

> "When a given rate, because of business conditions, becomes unfair, unjust, and unreasonable, the company has the power to demand fair, just, and reasonable rates. It initiates rates when the necessity here defined compels it; the wavering scale of reasonableness is the standard, and of it utility is the sole judge in the first instance, subject, of course, to what may later follow when the Commission's machinery is started."

See, also, *Pennsylvania Water & Power Company* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 U.S. 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 U.S. 246; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287; reversed on other grounds, 320 U.S. 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 U.S. 515.

required solely from the natural gas company, for Section 4(d) gives discretion to the Commission to permit change in rates and contracts without notice or hearing "for good cause shown." It is the only statutory notice to which Mobile was entitled from United. Had the Court below given this plain language the consideration it requires it would not have declared that Mobile's contract was being changed "without any statutory notice" (R. 144).

Mobile was required at its peril to obey the sanction of this notice for the provisions of the Act and the actions of the Commission thereunder respecting rates are equally binding upon it and United.[30] The Court below did not identify the "statutory notice" referred to, but there is no statutory notice defined or provided for by the Act as to change in rates or contracts affecting rates save that of Section 4(d), which here was admittedly given. The discretion to the Commission in Section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for * * *" is completely destructive of the Court's reasoning, for if Congress had intended that some notice outside the Act followed by a Section 5(a), or any other proceeding, were precondition to a change in "contract" relating to rates, surely it would not have vested its statutory administrative agent with power to permit change and destruction of "contract[s]" relating to rates without notice and hearing subject only to the statutory prescription "for good cause shown."

Instead the Court below proceeded in the teeth of Section 4(d) language to require rejection and dismissal of the filing and to order refunds — all prohibited by the

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[30] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, affirming *Northwestern Public Service Company* v. *Montana-Dakota Utilities Co.* (1950, 8 Cir.) 181 F. 2d 19, 22; *Colorado Interstate Gas Co.* v. *F. P. C.* (1945) 324 U.S. 581, 597; *Hope Natural Gas Co.* v. *F. P. C.* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 U.S. 591; *Woodrich* v. *Northern Pacific Railway Co.* (1934, 8 Cir.) 71 F. 2d 732; *Watab Paper Co.* v. *Northern Pacific Railway Co.* (1946, 8 Cir.) 154 F. 2d 436.

Act. The opinion reasoned: "To do otherwise would be an attempt by us to legislate judicially since the construction of Section 4(d) as contended for by the Commission and intervener is not warranted by the statutory language" (R. 154). But to reach the result declared, the Court below falls into the very judicial legislation it condemns, for there must be both deletion and addenda to Section 4(d) if the Act is to support such holding. The express direction for change or destruction of contracts relating to rates by the filing by the natural gas company followed by thirty days' notice, and the power to the Commission to permit such change without notice or hearing, must be deleted, and there must be added provisions affirmatively ordering the Commission to reject all filings by a natural gas company if there be contract rates until such time as a hearing is had to determine whether "on the facts such contracts are against the public interest." Further, there would have to be added other provisions affirmatively authorizing and ordering the Commission to require refunds. Thus as the dissent so cogently points out, the decision requires the Commission to take action contrary to the provisions of the Act, and requires it to exercise authority not expressly granted, which it may not do.[31]

How total is the war between the decision and Sections 4(d) and (e) is emphasized by the command to amend Paragraph (D) of the order of July 10, 1953 (R. 155) which, obeying the sanction of Sections 4(d) and (e), permitted the nonsuspendible resale industrial rates to become effective on July 25, 1953 (R. 69). Though Mobile originally sought such relief (R. 8, 13-16, 17-18) and was denied (R. 4-5), it did not so assert as a ground in its motion for rehearing (R. 38). Thus, by the express condition of Section 19(b), the Court below had no jurisdiction either to

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31 It is well settled that an administrative agency may exercise only those powers expressly granted to it by the basic act, nor may powers not granted be enlarged by the usurpation of a "decision". *Stark* v. *Wickard* (1944) 321 U.S. 288; *Waite* v. *Macy* (1918) 246 U.S. 606; *Arrow-Hart Co.* v. *Federal Trade Commission* (1934) 291 U.S. 587.

consider or to order as it did. *Federal Power Commission v. Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

Furthermore, the actions of the Commission are concerned with its rate making powers under the Act and thus are quasi-legislative in nature. Thus these actions embrace a field into which the Courts cannot intrude, and in which they have no authority save the statutory review "limited to keeping the Commission within the bounds which Congress has created."[32]

Further confusion results from failure clearly to specify under what section of the Act the ordered hearing can be had. Obviously, not under Section 4, which gives discretion to the Commission whether there shall be a hearing; nor is the distributor-purchaser (sic, Mobile) one of the class authorized by Section 4(e) to complain and thus force choice of the administrative discretion whether to hear. The ordered rejection of filing removes possibility of a 4(e) hearing, for filing pursuant to 4(d) is essential to require the Commission to exercise its discretion. Clearly, Section 4(e) refers only to a hearing on proposed new rates after they are filed and gives no power over rates superseded by the proposed filing. Thus, Section 4(e) does not warrant the hearing which the holding required.

Mobile contended that Section 4(d) applies only to rate modifications already agreed to and suggested it was included to prevent the parties from changing filed rates by secret agreements. This is in the teeth of the language. The Supreme Court has held that Section 4 was the "heart" of the new regulatory system. Negation of secrecy was not the goal of Congress in taking over the *Attleboro* "gap" — it enveloped it with control, regulation and establishment

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[32] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581. See, also, *Hope Natural Gas Co.* v. *F.P.C.* (1943, 4 Cir.) 134 F. 2d 287, 309, reversed on other grounds 320 U.S. 591; *Prentiss* v. *Atlantic Coastline Railway Co.* (1908) 211 U.S. 210; *B. & O. Railway Co.* v. *U. S.* (1924) 264 U.S. 258; *Home Telephone & Telegraph Co.* v. *Los Angeles* (1908) 211 U.S. 265; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947, 5 Cir.) 163 F. 2d 388, cert. den. 332 U.S. 770.

of uniform rates of equal applicability. At the time of the Federal Trade Commission Report, agreements were freely made, but Section 1(a) is sufficient to show that Congress proposed to replace untamed contracts with the discipline of comprehensive regulation and control, both legislative and quasi-judicial. Secret agreements could not exist because any attempt to charge or collect or pay aught save at the filed, i. e., legal, rates would violate the Act and Commission regulations, thus subjecting both parties to the rigorous and destructive penalties of Section 21 of the Act. If Congress intended to fill the vacuum of the *Attleboro* "gap" and in doing so "meant to create a comprehensive scheme of regulation,"[33] it should not be held that it left a hiatus by denying Section 4 applicability where there was a private contract. Mobile's contention would cut out the "heart" and leave the Act without a life-giving circulatory system.

Section 5(a) is the watchdog and policeman of the Act. That Section requires a hearing on complaint that a filed and effective rate is "unjust, unreasonable, unduly discriminatory, or preferential * * *." If unreasonableness be found, the Commission is empowered to fix a just and reasonable rate thereafter to be charged, and to lower the rate thereto, with express denial of power to order an increase "unless such increase is in accordance with the new schedule filed by such natural gas company." This filing can only be had under Section 4(d). The natural gas company is not one of those authorized to initiate a 5(a) hearing by filing a complaint. It seems obvious that whether a contract should be set aside as prelude to rate regulation, as held below, is not within the competence of 5(a). The Act nowhere intends or contemplates such a hearing. Section 5(a) not authorizing a hearing as to whether a contract is against the public interest as prelude to a filing under 4(d), the

[33] Cf. *Public Utilities Commission v. United Fuel Gas Co.* (1943) 317 U.S. 456, 467.

Court holding the natural gas companies not permitted to file any increase because of a contract, and the Commission being expressly denied power in 5(a) to increase a rate: the decision below effectively and completely destroys right or power to change or increase rates which are provided for in contracts. This shelters the inequality condemned in Section 4(b).

Furthermore, it suggests the method of escape from the regulation contemplated by Congress, for Section 4, if a contract exists, is effectively repealed: the natural gas company cannot initiate 5(a); the distributor-purchaser to such a contract surely could not be expected to initiate a 5(a); the institution of hearing by the Commission at best would be tenuous due to the heavy mass of its duties otherwise under the Act: the result is the decision below opens the way to escape regulation by making contracts.

Thus it is that the existence of a contract under the decision below emasculates Section 4 and produces a void in the Act forbidding regulation. Congress did not intend this; nor does the Act so warrant, for Section 4 rightly read provides that contract rates constitute no impediment but are subject to change as any other rates. Choice of the *Commission's* discretion between contract or proposed rate, or any other rate level, is always embraced within the singleness of "just and reasonable." "Just and reasonable" involves an area from the lowest level (below which rates will not be just and reasonable because confiscatory) and the highest level above which unreasonableness would occur because too high, the plane selected being given to the exclusive discretion of the Commission.[34] United and Mobile alike are entitled to, and bound by that rate as just and reasonable only when that rate is made specific by Commission act.[35]

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[34] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246; *Cities Service Gas Co.* v. *F.P.C.* (1940, 10 Cir.) 155 F. 2d 694, 698-9, cert. den. 329 U.S. 773.

[35] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

Thus contract filed rates may continue only so long as they occupy the plane selected by the Commission. No rate contract, fixed or otherwise, is rendered unimpeachable because "accepted" or "approved" by the Commission; nor does it thereby attain status not subject to change.[36]

Neither familiar concepts nor the original cost method, followed by the Commission, nor Sections 4 or 5 are based or dependent on "circumstances" or "inducements"[37] under which rate agreements are reached; rather there is involved the making of "pragmatic adjustments."[38] Clearly the

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36 *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 615.

37 The majority opinion refers to Mobile's contract as "recognized as late as July, 1952" (the date of the filing of increased rates) (R. 141); as an "existent unchanged approved contract" (R. 141) (Footnote 3); "the accepted contract" (R. 143). It is submitted these holdings are contrary to the record. In this respect Respondent's contract is precisely like that in *Tyler Gas Service Company* (R. 75-6) discussed in Footnote 3 (R. 141) of the opinion. The record shows that the particular supplemental contract relied on by Respondent was permitted to be filed by the Commission with this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended, nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated rate schedule, *nor shall this order be deemed as recognition of any claimed contractual* right or obligation affecting or relating to such service or rate" (R. 57).

This is not acceptance, recognition or commitment to approval of the position Respondent claimed. Cf. *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, 806. It is express refusal and denial to so consider the contract, notifying Respondent that the contract is accepted only in respect of the rates presently effective. See *Mississippi River Fuel Co.* v. *F.P.C.* (1941, 8 Cir.) 121 F. 2d 159. The Act would be imported into the contract in any event, and thus the caveat plus the Act expressly was an acceptance of the contract subject to changes provided by the Act.

Too, pursuant to the Rules of the Commission (see p. 6-7, and Footnote 6, p. 5 herein) a statement was filed pursuant to the requirement of Section 154.85. This statement (R. 58-9) shows Supplement 10 to Supplement 7 completely eliminated with express Commission approval (R. 63, Par. (2); R. 64 Order (C)). Thus the current filed rates at the time Petitioner filed the application in G-2210 for increase were not those of the contract, but those of the conversion tariff. The majority opinion ignored these orders and their effect. Replacement of Mobile's contract with the conversion tariff is thus in precisely the same situation as that of *Tyler Gas Service Company*, which the majority opinion characterized as an "adversary" proceeding against the Tyler contract (R. 141, Fn. 3).

38 *F.P.C.* v. *Natural Gas Pipe Line Company* (1942) 315 U.S. 575, 586; *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 602.

Commission has been ordered to substitute the Court's judgment not only as to how the Commission may proceed to find "just and reasonable," but what is "just and reasonable," i. e., the rate, a holding squarely in conflict with the well settled rule that courts may not so substitute their judgment for the administrative decision, because that determination and decision is given exclusively to the Commission.[39]

The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 setting a 4(e) hearing[40] is equally in conflict with the well settled rule that an application for increased rates may not be dismissed without a hearing.[41] This not only requires the Commission to violate the Act but deprives United of rights guaranteed by the Act.

Further violence to the Act results from the attempted distinction of the *Tyler* case (Fn. 3, Op. R. 141). The Court below was without right to assume that all rates other than resale industrial would have a 4(e) suspension, for whether there shall be either suspension or refund requirement is discretionary with the Commission. Under the reasoning of the Court below, failure to suspend or require refunds would produce another "gap" in the Act identical with that resulting here. Furthermore, the distinction impliedly concedes lack of necessity for a contract hearing by the sug-

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[39] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581; *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.* (1945) 325 U.S. 635; *F.P.C.* v. *Natural Gas Pipeline, supra; Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

[40] The Commission's order of December 7, 1953, from which Mobile appealed, recites the hearing on the consolidated dockets, including Docket G-2210 (the 4(e) hearing on increase to Mobile) and G-1142, (the 5(a) proceeding involving all of United's rates) had then proceeded to the point where United had presented its direct case in support of the filing in Docket G-2210 (R. 4).

[41] *F.P.C.* v. *Natural Gas Pipe Line Company* (1942) 315 U.S. 575, 583; *Atchison, Topeka & Santa Fe* v. *U.S.* (1932) 284 U.S. 248, 262; *Ohio Bell Telephone Company* v. *Public Utilities Commission* (1937) 301 U.S. 292; *Morgan* v. *U.S.* (1936) 298 U.S. 468.

gestion that refund provisions of Section 4(e) are either adequate contract protection or equivalent to the hearing; but refund is not based on the superseded contract rates, it is the difference, if any, between the proposed new rates and those the Commission ultimately finds to be just and reasonable. Correctly considered, contract rates are nothing more than evidence relevant to Commission determination of the ultimate issue of just and reasonable, which determination is adequate protection procedurally and substantively to the "contract". That evidence of contract rates for Commission consideration in arriving at "just and reasonable" is sufficient guarantee to "contract rights" is conclusively shown by the language of 4(e), ignored by the majority opinion, which provides that after the 4(e) hearing "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." This language gives the Commission all the powers it possesses under Section 5(a).[42]

The implied suggestion that suspension under 4(e) is equivalent to a 5(a) hearing distorts and is unsupported by the purpose and genesis of suspension.[43]

Examination of the report and debate on the Mann-Elkins Act (45 Cong. Rec., p. 3465-3472) shows that suspension was created to prevent effectiveness of new and increased rates pending Commission investigation of their reasonableness; not for the purpose of preserving a existing rate pending Commission determination of its unreasonableness. The right of initiation was considered to be a property right

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[42] *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *State Corp. Commission of Kansas* v. *F.P.C.* (1954, 8 Cir.) 215 F. 2d 176, 183.

[43] Suspension provisions first arose in the Interstate Commerce Act, 49 U.S.C. 15(7) by virtue of the Mann-Elkins Act Amendment of June 18, 1910, Ch. 309, Sec. 12, 36 Stat. 552, amended to the present form by the Transportation Act of February 28, 1920 c. 91, Sec 418, 41 Stat. 386. Suspension provisions also were inserted as to bus carriers, etc. See 49 U.S.C.A. 316(g). The refund provisions in the Natural Gas Act, Sec. 4(e), 15 U.S.C. 717c(e) are similar to those in the Federal Power Act 16 U.S.C. Sec. 824(d)(e).

(p. 3472). It was thought preferable that rate initiation should be the burden of the Railroad (p. 3471) because the volume would be too great for the Commission to initiate. The effort was to achieve protection of the shipper without doing violence to the property right of the railroad to initiate and receive the rate because required for the proper operation of the business.[44] Thus in the Mann-Elkins Act Congress was seeking a balance between the property right of the carrier on the one hand and protection to the shipper pending opportunity of the administrative agency to *determine the reasonableness of* the proposed new rates. The power to suspend being discretionary with the administrative agency, the courts, under the doctrine of primary jurisdiction, concluded not to interfere, and thus was the balance preserved.[45]

Senator Elkins advised the Senate (p. 3470) that contracts for rates were subject to all of the terms of the Act, summing it up with the statement "What power or control could be stronger?"

In Section 5(a) of the Act, Congress carefully added to the governmental protectors of the public interest the "gas distributing company" as one authorized to file such complaint of unreasonableness against an existing rate. This selective handling demonstrates the impropriety of the decision below, for surely if, as adjudged, a contractee

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44 These hearings were considered in *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, where speaking of the course of the debates and particularly those on p. 3472 (45 Cong. Rec.), Judge Parker held that the suspension provisions of the Natural Gas Act were a "reasonable limitation upon the exercise of the property rights of the carrier", p. 809. Judge Parker also demonstrates that the suspension provisions of Section 4(e) were imported from the Mann-Elkins Act and quotes at length from Scharfman (The Interstate Commerce Commission Vol. 1, p. 201-2) upon the purport and effect of the period of suspension (p. 806-7).

45 See *Manhattan Transit* v. *U.S.* (1938, D.C. Mass.) 24 F.S. 174, 177; *B. & O. Railroad* v. *U. S.* (1910) 215 U.S. 481; *Board of Railroad Commissioners* v. *Great Northern Ry. Co.* (1930) 281 U.S. 412; *Kiser* v. *Central of Georgia Railway* (1916, D.C.S.D. Ga.) 236 F. 573, affirmed 239 F. 718; *Algoma Coal & Coke Co.* v. *U.S.* (1935 D.C.E.D. Va.) 11 F.S. 487; *Merchant Truckmen* v. *U.S.* (1936, D.C.S.D. N.Y.) 16 F.S. 998; *Caralson* v. *U.S.* (1952, D.C.S.D. N.Y.) 107 F.S. 398.

such as Mobile has a "common law" standing superior to "statutory regulation" until the brake of its "common law contract right" is released, the right under Section 4(e) to apply that brake to proposed rates effecting change in contract rates would have been statutorily specified.

Predicating the holding upon a statement made by the Congressman who introduced the amendment prohibiting suspension of industrial resale rates, the Court said that language applied only to "short-term contracts" (R. 152). No such condition appears in the language of the Act. Such legislative history may not be used to amend the statute. *Dameron v. Broadhead* (1953) 345 U.S. 322. Whatever the "Congressman who introduced the amendment" understood to be a "short-term contract", Congress did not see fit when it prohibited suspension to prohibit suspension only of short-term contracts. It prohibited any suspension of industrial rates. The decision does not indicate what constitutes a "short term."

No basis exists for the assumption, which the footnote on *Tyler's* case suggests, that Congress intended power under Section 4(e) to suspend rates other than industrial resale or to order refunds, should be in lieu of the hearing here ordered. If so, Congress then would have required suspension of rates for resale for industrial use only and made the suspension of Section 4(e) obligatory, not merely discretionary. Common law contracts for resale for industrial use have equal dignity at the law with domestic resale contracts. If the court intends a difference, additional insertion of addenda in 4(e) is immediately required. If there be no difference, then the court's reasoning does not merely emasculate Section 4, it strikes it down, because Section 4(e) then would contain an invalid and unreasonable classification. The court's reasoning gives no answer for the situation where the Commission elects not to suspend under Section 4(e). Apart from judicial review, this Court has made it abundantly clear that the Act is for the Commission

to administer, that the courts may not interfere with the Commission's exercise of that power nor substitute their judgment for that of the Commission.[46] Yet the Court below directs action contrary to the authority of the Act and requires issuance of orders contrary to the plain statutory provisions. This is not judicial review; it is legislative substitution of judicial judgment for adminstrative judgment which is exclusively vested in the Commission.[47] Thus in the context of the decision the requirement of a hearing upon the contract is in fact a judicially conceived suspension period applicable to new rates wherein the new rates themselves are not suspended but the right of application is suspended pending a hearing against the existing rates. This is suspension in reverse.

The Court below seeks to buttress its holding by declaring that a filing under Section 4(d) where a private contract exists is "unilateral" and thus to be forbidden. This identical contention was pressed upon the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1954, 5 Cir.) 217 F. 2d 73, 78, but Chief Judge Hutcheson agreeing with the District Judge, rejected the contention as without merit upon the ground that compliance with Section 4(d) as a matter of law could not be "unilateral". If filing pursuant to direction of the statute be "unilateral", then Congress has stipulated for "unilateral" action.

Sections 4(d) and (e) of the Act were taken almost ver-

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[46] *F.P.C.* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 617; *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251; *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581, 589.

[47] From earliest times the courts consistently have said that statutory amendment by judicial construction violated the constitutional guarantee of separation of powers and have refused to approve such judicial amendment on the ground that "* * * it is the duty of judges to declare, and not to make, the law". *Fowler* v. *Lindsey* (1799) 1 L. Ed. 658; *Filene's Sons Co.* v. *Weed* (1918) 245 U.S. 597, 602; *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 324 U.S. 581; *Collins* v. *Hardyman* (1951) 341 U.S. 651 (saying: "It is not for this court to compete with Congress or attempt to replace it as the Nation's law-making body", p. 663); *U.S.* v. *Great Northern Railway Co.* (1952) 343 U.S. 562, 575.

batim from the Interstate Commerce Act and must be interpreted in the light of the Act, State statutes substantially similar to the Act and court decisions interpretative thereof under the applicable rule that "where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also."[48]

In *Armour Packing Co.* v. *United States*, (1908) 209 U.S. 56, affirming (1907, 8 Cir.) 153 F. 1 this Court held that an ex parte filing of an increased rate under the Interstate Commerce Act which became effective without an administrative hearing was the only rate that could be charged and abrogated rates fixed by pre-existing contract. This decision was reached solely on the basis of Section 6(3), which is substantially similar to Section 4(d) of the Act, even though at the time of contract the Interstate Commerce Act gave no recourse to the Commission in the nature of either a 4(d) or a 5(a) proceeding under the Act to determine whether the rate so imposed was reasonable. Indeed, at the contract date the Interstate Commerce Act contained only a 4(d) character section; a comparable 5(a) Section was incorporated during pendency of the case; a comparable 4(e) Section was not introduced until after disposition in this Court.[49]

State and Federal courts have also held that rates filed ex parte under the provisions of State Public Utility Statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Act, were the only lawful rates which might be charged, and to the extent that rate provisions of any

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[48] *Hope Natural Gas Company* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 806, 807.

[49] Section 6(3) of the Interstate Commerce Act, included therein by original act of February 4, 1887, c. 109, 24 Stat. 381, is comparable to Section 4(d) of the Act; Section 15(7) added by act June 18, 1910, c. 309, §12, 36 Stat. 552, is comparable to Section 4(e); Section 15(1) added by act June 29, 1906, c. 3591, §4, 34 Stat. 589, is comparable to Section 5(a) of the Act.

existing contract between the utility and a consumer provided for a rate different from the rate so filed, such contract was void:

(a) New York:

North Hempstead v. *Public Service Corp.* (1921) 231 NY 442, 132 NE 144:

Provisions of the Public Service Commission Law substantially identical to Section 4(d) of the Act were imported by law into agreement between a gas distributor and the city, and were notice that the distributor was empowered to increase rates in the manner statutorily prescribed, notwithstanding the agreement and without prior determination of reasonableness. (Opinion by Judge Pound, Judge Cardoza concurring.)

Public Service Commission v. *Pavillion Natural Gas Company* (1921) 232 NY 146, 133 NE 427:

Under the same Act, gas distributor could increase maximum rates fixed by franchise granted prior to the effective date of the statute "by simply filing a schedule of rates with the Commission, notwithstanding a pending hearing on the reasonableness of prior rates."

(b) Missouri:

Kansas City Power & Light Co. v. *Midland Realty Co.* (1936) 338 Mo. 1141, 93 SW 2d 954, affirmed, *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109:

This case is strongly apposite and controlling here. The Court admitted it did "lend some support" (R. 145) but refused to apply it The parties contracted for specified rates for a firm period before the effective date of the regulatory statute. Utility filed ex parte with the Commission on June 28, 1917 for rates higher than the contract rates.

In September, 1917, users of steam heat service, not including Midland, filed a complaint against the rates which upon hearing the Commission found "unjust and unreasonable", and ordered a reduction which, however, remained above the contract rates. The ordered rates became effective March 1, 1918, and thereupon superseded the rates of the ex parte filing dated August 1, 1917. In June, 1918, the utility filed a proceeding claiming the second proceeding rates to be inadequate and confiscatory. In a third hearing the Commission allocated between heating and electrical service, which it had not done in the second hearing, and thereupon found the second proceeding rates unjust and too low, and ordered higher rates effective December, 1919. Suit was for the difference between the contract rates and the order of the second proceeding between March 1, 1918, and August 31, 1918, the date of expiration.

The Missouri statute is substantially similar to the Interstate Commerce Act, the Act here, and the statutes of Pennsylvania, Illinois and Arkansas considered herein. This Court held that the contract rates were superseded and replaced by the statutory rates. In denying the contention that contracts could not be so abrogated without a proper hearing, finding, and order of the Commission with respect thereto, this Court said that Midland

> " * * * does not, * * * reasonably could not, contend that immediate exertion * * * [of legislative] power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that as against * * * contract [rates] * * *, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature" (p. 114).[50]

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[50] To support this holding the Court (Fn. 9, p. 114) cites *Public Service Commission* v. *Pavilion Natural Gas Company* and *North Hempstead* v. *Public Service Commission* cited herein in subdivision (a) (p. 62):

The Court below and the Court of Appeals for the District of Colum-

(c) Pennsylvania:

The following decisions are under provisions of the Public Service Company Law of 1913 substantially the same as Sections 4(d) and (e) of the Act:

Suburban Water Co. v. *Borough of Oakmont* (1920) 268 Pa. 243, 110 A. 778:

"The filed rate, without administrative action, modifies or reforms pre-existing contract so that the filed rate replaces

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bia Circuit in *Sierra Pacific Power Co.* v. *Federal Power Commission* (1955), ... F. 2d ..., pending on certiorari Nos. 51, 53 this Term, in our submission, wholly misconceived the *Midland* case. Both courts say *Midland* involved a construction by the Supreme Court of Missouri upon a Missouri statute, and the Court below additionally suggests that the question was whether the Missouri statute violated the Federal Constitution, which it says was a problem not involved here.

The violation asserted allegedly arose from the holding by the Missouri Court that rates filed or established by the Commission (under Missouri statutes substantially similar to the Act), superseded and were superior to contract rates. The Missouri statute, this Court said, was to be "taken as if it declared that rates made in accordance with [statutory] provisions shall supersede all existing contract rates" (p. 113). For this statement it cited *Fulton* v. *Public Service Commission* (1918) 275 Mo. 67, 204 S.W. 386, and *State ex rel. Sedalia* v. *Public Service Commission* (1918) 275 Mo. 201, 204 S.W. 497, which cases were pressed upon both courts by Mobile and Sierra Pacific as rendering all private rate contracts void on the reasoning that the mere existence of a private rate contract constituted an unconstitutional impairment of the police power of Missouri. The Missouri cases do not so hold. In *Sedalia* the city gave a franchise to a city water company which set rates for hydrant rent. On complaint of the citizens of Sedalia the Missouri Commission required the water company to expand its facilities and for such improvements and extensions increased the rates. The city contended its ordinance was adopted pursuant to legislative delegation and was superior to the action of the Public Service Commission. The Missouri Court held that the Legislature could not delegate power to abridge its police power, for the Missouri Constitution forbade abridgement of that power. In holding that the Commission had the power to fix reasonable rates, irrespective of the contract, the Missouri Court did not proceed upon the theory or holding that the contract was void by its mere existence, as contended. It held that it was superseded by the act of the Public Service Commission in fixing rates whenever made, saying:

> "Under it [i.e. the Constitutional provision] no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rates. Under the Constitution and the Public Service Commission Act the Public Service Commission (supervised by the Courts as to the reasonableness of rates) is exercising the police power of the State by its delegated authority from the Legislature. Its rates therefore, constitutionally and legally, *supersede* any and all contract rates." (p. 499-500.)

that of the contract and becomes the only legal rate which may be charged.

Duquesne Light Company v. *Public Service Commission* (1922), 273 Pa. 287, 117 A. 63:

The Pennsylvania Supreme Court affirmed a reversal ordered by the Superior Court of a Commission rule in a 4(e) type hearing wherein the Commission held that a contract rate was valid against a 4(d) type filing, thus repudiating contention that the hearing and establishment of abrogation are a precondition to change and reaffirming that the rate filed in accordance with statutory prescription becomes the only rate chargeable.

Leiper v. *Baltimore & P. R. Co.* (1918) 269 Pa. 228, 105 A. 551:

Holds that filing of a rate increase has effect to abrogate pre-existing contract rates, for "[t]o permit the contract * * * to stand as against rates established * * * in conformity with the provisions of the law would be to nullify the purposes of the Act."

V. & S. Bottling Company v. *Mountain Gas Company* (1918) 261 Pa. 523, 104 A. 667, appeal dismissed 251 U.S. 544:

A contract rate held inoperative after the act became effective on the tariff filed.

(d) Arkansas:

Harrison Electric Co. v. *Citizens Ice & Storage Co.* (1921) 149 Ark. 502, 232 S.W. 932:

Held that the act of filing a rate schedule under statutory provisions identical in substance with Sections 4(d) and (e) of the Act was effective to supersede contract-fixed rates without prior administrative determination.

(e) Illinois:

Colton v. *Commonwealth Edison Co.* (1953) 349 Ill. App. 490, 111 N.E. 2d 363, 366:

This case was based on a utility statute similar to the Act. The Court held that injunctive relief by courts of equity would be denied where the Utilities Commission had permitted filed rates to go into effect without hearing, as the order could not be attacked collaterally but must be reviewed in the manner prescribed by statute, saying further:

> "* * * the Utilities Act superseded all common law remedies so far as rates are concerned; * * * the statutory remedies afforded consumers under the Act are exclusive; * * * the initiation of a rate is an attribute of management by a utility subject to the power of the Commission to change a rate if it finds it not just and reasonable; * * * the rate filed by a utility in accordance with the procedure prescribed by the Act is presumed to be lawful and must be complained of in the first instance before the Commission."

Antioch Milling Company v. *Public Service Company of Northern Illinois* (1954) 4 Ill. 2d 200, 123 N.E. 2d 302:

Under a statutory section like Sections 4(d) and (e) of the Act, the utility made an ex parte filing of rates which superseded a rate set by agreement under a rider, and filed a motion for the new rates to go into effect without suspension. The Commission record does not disclose what occurred at this hearing, but the motion was granted. Thereafter a complaint was filed against the new schedule of rates as unreasonable and discriminatory and attacking the propriety of the Commission permitting them to become effective. This complaint was dismissed. The Court affirmed the ex parte filing, and held the filed rates superseded the rider rates. It sustained the discretion of the

Commission to permit the new rates to become effective without suspension or hearing.[51] Comparability of the section of the Illinois statute to §15(7) of the Interstate Commerce Act (sic, Sec. 4(e)) was noted. Cf. Fn. 49, p. 61 herein.

2. The Decision Below Is In Conflict With Another Decision Of The Third Circuit, And With Decisions From Other Circuits.

The holding that contract provisions and rights are not subject but are superior to provisions of the Act and are controlling over the regulatory scheme until found to be against public interest in a proceeding brought for that purpose is clearly inconsistent with decisions from other circuits:

(a). The Fifth Circuit in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1945, 5 Cir.) 162 F. 2d 388, cert. den, 332 U.S. 770, held that a "favored nation" clause for a lower rate contained in a contract became "inoperative" after passage of the Act; that while Section 4 placed a "burden" on a natural gas company to file a new schedule,

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[51] Below Mobile, asserting that Supplement 10 to Supplement No. 7 was agreed upon to obtain new business from Ideal Cement Company, claimed the contract entitled to special consideration and protection. Holding a similar contention baseless in *Antioch*, the Court said:

> "The preferential rate here involved was introduced around 1911 with the aim of stimulating daytime consumption of power, which at that date was relatively slight. The recipient of the benefit of a preferential rate designed to increase off-peak demand has no cause for complaint if it is discontinued." (p. 307.)

The Court below suggests that the "long term" of Supplement No. 10 to Supplement No. 7 having been "accepted" by the Commission was somehow entrenched against change by the statutory scheme until it was first attacked and demolished. In *Antioch* the Supreme Court of Illinois said:

> "It is also argued that the long continuance of the rider creates a presumption that it was reasonable. We question whether this is so. Cf. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 31 S. Ct. 288, 55 L. Ed. 283, but the main point is that the issue before the commission was not the reasonableness of the former rate but the reasonableness of the new rate. Cf. *Produce Terminal Corp.* v. *Illinois Commerce Commission ex rel. Peoples Gas Light & Coke Co.* 414 Ill. 582, 597, 112 N.E. 2d 141."

Section 5 gave adequate remedy and right to the distribution company, by complaint, to have determined whether a rate was proper under the terms of the Act. No special proceeding against the contract was suggested. The Court declared that consideration of the enforcement of the contract provision would require it to invade the exclusive province of the Commission for rate making:

(b) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipeline Company* (1949, 6 Cir.) 173 F. 2d 784, affirming (1948, D.C.E.D. Mich.) 80 F. S. 27. Michigan Consolidated had a contract with Panhandle Eastern for delivery of natural gas requirements up to 125,000,000 cubic feet per day. Panhandle was unable to make the contractual deliveries because of insufficiency of a compressor station. The Commission ordered operation to take care of all customers in Michigan and Ohio except the two largest customers, Michigan Consolidated and Michigan Gas Storage, and as to them ordered pro-ration of the balance. Michigan Consolidated did not seek a judicial review under Section 19(b) of the Act. Instead it sued in District Court (1) for specific performance to compel contractual delivery, and (2) for mandatory injunction to require Panhandle to operate the facilities so as to insure contractual delivery. The Court held that "* * * contracts entered into by private parties lose their force to the extent they conflict with orders or regulations of the Commission."

(c) In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1941, 8 Cir.) 121 F. 2d 159, a contract filed as a rate schedule contained an escalation clause for increased rates to be effective after January 1, 1940. The Commission suspended application for the increased rate and, upon hearing, refused to approve the increased contract rate and continued in effect the pre-escalation contract rate. Mississippi appealed under Section 19(b), claiming priority and superiority to contract rate, but the Court held that the contract and its rates were subject to regulation

in the public interest and disposed of it in a 4(e) proceeding without requiring a special proceeding or one under 5(a).

(d) In *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (D.C.E.D. Texas, December 29, 1953) unreported (reproduced R. p. 73-81), affirmed (1954, 5 Cir.) 217 F. 2d 73, the facts and contentions of the parties were identical with those made by Mobile here save in one respect: the *Tyler* rates were rates for domestic resale and thus subject to suspension and were suspended, whereas the *Mobile* rates were for industrial resale only and so not subject to suspension. Tyler, by injunction, sought to declare contract rates superior to change under Section 4 until abrogated by the Commission under Section 5(a) of the Act. United moved to dismiss, because the suit sought "to enjoin compliance by the defendant with the provisions of the Natural Gas Act and more particularly with Section 4 thereof, and because it in effect bases its claim to declaratory and injunctory relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed, override the provisions of the Act itself" (217 F. 2d 74).

Such contract rate superiority is Mobile's position. The gravamen of *Tyler's* case, as *Mobile's* was "that unless and until the contracts sued on are set aside for some invalidity or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates" (p. 76).

The District Court in *Tyler* said:

> "It is abundantly clear that United may not by private contract fix binding long-term future rates with

its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function." (R. 77);

that because United was charged "with a public interest" it "may not by private contract for future rates" collect a rate either "excessive, because * * * unfair to the consumer; neither may it bind itself to rates * * * determined to be confiscatory", because such "would jeopardize its ability properly to serve the public in the future" so that the rate making provisions of the contract as well as other provisions

"* * * are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with a governmental regulation or with public policy, the former must yield.

* * *

"So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates." (R. 77-8.)

Chief Judge Hutcheson for that Court, in affirming such holding, stated:

"We find ourselves, on the contrary, in agreement with the well considered and expressed views of the

district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission."

So holding, he summed up the matter thus:

"Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

"So thinking, he rejected, as we reject, the plaintiff's view that the district court *could* and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding." (p. 77-8.)

This clashes at all points with the holding below that Mobile's contract is superior to Section 4, so that neither United nor the Commission can lawfully enforce or comply with Section 4, nor the Commission regulate the contract rates until first it abrogates the contract as against public interest. Cf. *Pennsylvania Water & Power Co. v. F. P. C.*, (1952) 343 U.S. 414, 421-2, 423-4.

Below, Mobile contended that since there was a contract fixing rates, United's filing of new rates under Section 4(d) was "unilateral" and illegal; and that Court agreed, holding the Commission without power to receive the filing which it further held void. But the Fifth Circuit, rejecting the identical contention made by Tyler, expressly affirmed the District Court holding that such filing under

4(d) could not be "unilateral" saying that "the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme" (p. 78).

That the Fifth Circuit viewed Sections 4(d) and (e) as expressly providing for change of contract rates by the natural gas company clearly appears from the further holding that the trial court "correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court cannot do" (p. 78).

Thus, *Tyler* is squarely in collision with the decision below.

But Mobile (Opp. Br. p. 11) asserted the baseless claim that *Tyler* is inapposite because arising as a "collateral" proceeding. The short answer is that if, as held below, United's filing under Section 4(d) was void and the Commission without power to receive or permit such filing, it could be collaterally attacked anywhere for lack of jurisdiction and voidness under the classic bases permitting collateral attack.

In its Opposition Brief (p. 12) Mobile quoted the concluding paragraph from *Tyler*[52] upon the claim that Tyler

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[52] The last two paragraphs of the Fifth Circuit opinion in the *Tyler* case are as follows:

> "Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883, 892, appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act 'the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates.'
>
> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastic, the dissenting member, is wrong, we think

was thus rendered inapposite to the decision below; but that paragraph must be read with the paragraph immediately preceding it which clearly shows that all the Fifth Circuit thereby intended was that no conflict existed with the decision here on the procedural question that the Commission was the correct forum for determination of the rights asserted. On the primary substantive questions as shown above, the Fifth Circuit was at categorical pains to frame the conflict it drew respecting the effect, rights, and duties of Section 4 upon private contract rates.

(e) The decision below is in square conflict with another decision of the Third Circuit, and thus presents an "intra-circuit conflict" of a type for which this Court has exercised review. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 U.S. 507, 508; *John Hancock Insurance Co.* v. *Bartels,* (1939) 308 U.S. 180, 181.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988), the Commission acting as the Court below now orders, rejected and dismissed a filing under Section 4. There the Third Circuit reasoned that the "face" of Section 4 gave the Commission only two alternative choices: to allow the change to become effective by failure to act; or to enter upon a hearing and suspend for a maximum period of five months. Instead, reasoned the court, "It purported to follow a third course, rejection without hearing — a course for which it cannot show even color of statutory authority." Statements in the Court's opinion that the *Mis-*

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it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief.'; and that the plaintiffs did not show grounds for equitable relief." (p. 78.)

sissippi case is distinguished from this case are wholly inaccurate; the situation is precisely the same.[53]

The record here shows that neither the "until" clause nor the last proviso (italicized by the Court) has yet become applicable to Mobile's contract. The required statement (R. 58-59) filed by United shows that contract rate

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[53] The various grounds of distinction stated are clearly inaccurate. First, the plain language of Sec. 154.85 of the Commission's Rules is misconstrued. That part italicized by the Court is inapplicable to this record. The language which should have been italicized as applicable here provides that the filed contract

> "* * * shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

and that of the first proviso:

> "That the natural gas company concurrent with the filing of the tariff shall submit, for insertion in each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

(See Fn. 6, p. 5 herein.)

Second, the surprising statement in the course of consideration of Section 154.85 that "there is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate." (Opinion, Fn. 16, R. 153.)

United vigorously urged that the conversion tariff filed under requirement of Section 154.38(d)(3) (See Fn. 6, p. 5 herein) which prohibited percentage rate clauses and tax adjustment clauses; the statement (R. 58-59) filed pursuant to Section 154.85 showing complete elimination of Supplement 10 to Supplement 7; the Commission's order of August 1, 1952, in Docket G-2019 (R. 60) ordering the conversion tariff to be filed and become the effective filed rate schedule; followed by Mobile's failure to take an appeal under Section 19(b) of the Act: all conclusively showed the contract to be replaced and superseded by the conversion tariff and that such was *res judicata*, citing *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381.

Third, the conclusion that "United's filing on June 24, 1953 did attempt to 'effect a change' in an unexpired contract without 'the execution of a form of service agreement contained in the tariff'", based upon the misconception of Section 154.85 is wholly incorrect. United's filing of increased rates on June 24, 1953 in Docket G-2210 did not purport to effect a change in a contract, for that contract had not, as such, existed as a "filed contract" since July 3, 1952, the date of filing of the conversion tariff in Docket G-2019 (R. 60) approved by the Commission. Further, Section 154.85 has nothing to do with filing changed rates under Section 4 of the Act. Finally, the execution of a form of service agreement contained in the tariff required in the last proviso of Section 154.85 applies, as expressly stated, only to a change or amendment of that part of the contract which the first part of the Section kept as an executed service agreement. Increased rates did not purport to change or amend that part of the contract left, for such remaining part did not set a rate.

Fourth, and most important of all, the suggestion that there is a difference factually and contract-wise between this and *Mississippi's* case is without basis. The record in that case shows *Mississippi* proposed a change in filed contract rates by a Section 4(d) filing (See Jt. App. p. 4a, 7a in No. 10868 in C.A. 3). The contract-conversion tariff situation between

provisions were not retained, thus could not have been the "existing filed contract" rate.

The Third Circuit then examined the dismissal and rejection of Mississippi's filing as being comparable to a motion to dismiss for failure to state a claim upon which relief could be granted, or motion for summary judgment, and concluded the rejection improper because "The statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures" (p. 902). It thereupon set aside the Commission's order on the ground that the dismissal was "wholly beyond the authority of the Commission." This conclusion was undoubtedly right, for the Commission, as the regulatory agent, is possessed only

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Mississippi River Fuel Corporation and its customer LaClede Gas Co. (202 F. 2d 904) was precisely identical to that here between United and Mobile. The public files and records of the Commission show: (1) *Mississippi* filed contract with LaClede dated October 2, 1947, which the Commission numbered as FPC Rate Schedule No. 26; (2) several amendments to the contract were filed prior to July 1, 1949; (3) on July 1, 1949, *Mississippi* filed its conversion tariff in compliance with Section 154.38(d)(3), also its statement pursuant to Section 154.85, which superseded the original contract; (4) the Commission permitted the conversion tariff to be filed. Thus, in 1953 when the Court below decided *Mississippi's* case the situation was precisely like that here. There is no doubt that the Court in *Mississippi's* case should judicially have known, and that this Court will take judicial knowledge and notice of these facts irrespective of whether they were a part of the record before that Court or not. See *Interstate Natural Gas Co.* v. *Southern Cal. Gas* (1953, 9 Cir.), 209 F. 2d 380 (Judicial notice "of records and reports of Administrative bodies" — contracts on file and orders in collateral proceedings); *Washington Gas & Light Co.* v. *Baker* (1951, D.C. Cir.) 195 F. 2d 29, 35 (application for rate increase filed since argument of the appeal); *Fletcher* v. *Jones* (1939, D.C. Cir.) 105 F. 2d 58, 61-2, and cases in Fn. 14, p. 61, cert. den. 308 U.S. 555 (Records and Reports of Home Owners Loan Board and Home Owners Loan Corporation, "even though formal proof thereof" not made below); *Colonial Air Lines, Inc.* v. *Janas* (1953, 2 Cir.) 202 F. 2d 914, Fn. 1 (Press release on action of CAB which court characterized "official action by a federal regulatory agency, not a part of the record below"); *NLRB* v. *Atkins & Co.* (1947) 331 U.S. 398, 406 (Circular of regulations not offered in evidence before the Board); *Savannah River Electric Co.* v. *Federal Power Commission* (1947, 4 Cir.) 164 F. 2d 408, 410 ("Public Records" including letters between executive branches of the Government, reports to Congress, Presidential Orders, contracts of Government agencies, most occurring after Commission action); *Greeson* v. *Imperial Irrigation District* (1932, 9 Cir.) 59 F. 2d 529, 531 ("Public Facts", "Geographical Positions", "Public Activities within Common Experience"); *Arizona* v. *California* (1931) 283 U.S. 423, 452 (Navigability of a part of the Colorado River); *Tucker* v. *Texas* (1946) 326 U.S. 517, 519;

Finally, the statement that in *Mississippi's* case the Court assumed Commission authority to reject a filing not conforming to its rules and

of those powers expressly granted by the Act and it possesses no inherent powers by virtue of its existence.[54]

But here the Court below under cover of the very procedures condemned as unavailable in *Mississippi* ordered refund of monies under the equitable doctrine of restitution. Aside from restitution the Court had no jurisdiction to so order because Mobile did not expressly reserve such a ground in its motion for rehearing: See p. 84-5 herein.

This gives added point to the dissent of Judge Hastie who spoke for the same Court in the *Mississippi* case. If the Third Circuit was right in *Mississippi*, it could not be right here. The opinion in *Mississippi*, when examined in the light of the Act and the cases above discussed, clearly demonstrate that that opinion was correct.

3. The Cases Relied On By The Court Below Do Not Support Its Decision.

The majority opinion principally relies on *Wichita Railway* v. *Public Utilities Commission* (1922) 260 U.S. 58, involving a Kansas statute and its application under Kansas law. This Court held that Section 13 of that statute fixed the *only* way in which a filed and effective rate could be

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citing Section 154.24. But the assumption was strictly limited to matters of form, i.e., "power to require schedules and supporting data to be organized or broken down into convenient and readily comprehensible form." (p. 902.) The Court then tested the assumption as well as the Commission action by comparing it to motions to dismiss for failure to state a claim, or motion for summary judgment, repudiating any power for summary rejection so comparable by rightly concluding that "the statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedure." (p. 902.)

Thus, Section 154.24 (Op. Fn. 17, R. 154) which was in existence and subject to judicial knowledge of the court at the time of such decision was not deemed grounds for affirming rejection nor does the opinion indicate the Commission so urged. Obviously this also applies only to form.

[54] *Stark* v. *Wickard* (1944) 321 U.S. 288, 309; *Federal Trade Commission* v. *Sinclair* (1923) 261 U.S. 463, 475-6; *Federal Communications Commission* v. *American Broadcasting Co.* (1954) 347 U.S. 284, 290; *Arrow-Hart & H. Electric Co.* v. *Federal Trade Commission* (1934) 291 U.S. 587, 598; *Montana-Dakota Utilities Co.* v. *Federal Power Commission* (1948, 8 Cir.) 169 F. 2d 392, 397, cert. den. 335 U.S. 853.

changed, set aside, fixed, determined, or substituted. Section 13 authorized the Commission "either upon complaint or upon its own initiative" to investigate and have "a full hearing" and "if then the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential" it shall "fix and order substitued therefor" just and reasonable rates. The Utility claimed Section 20 gave it power to change rates (comparable with that conferred by Section 4(d) of the Act), but this Court held that Section 20 gave no power to change or affect rates. It thus appears that the Kansas statute was in no manner comparable to the Act; nor did it contain any provisions comparable to Section 4 which expressly authorizes rate changes. In addition Section 13 authorized the Kansas Commission to fix and order rates substituted for filed and pending rates. Section 5(a) gives the Commission no such power. The Commission may lower, but not raise, rates; and if the adjudged just and reasonable rates be higher than the filed rates, such adjudged rates under Section 5(a) cannot become effective until the natural gas company files pursuant to Section 4(d).

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Company* (1937) 300 U.S. 109, which the Court below hurried by with the statement that it "does lend some support to the position of the Commission and the Intervener" (R. 145), but sought to distinguish on the ground that it was decision based upon a state court interpretation of a state statute which it conceded was precisely the situation in the *Wichita* case, though without explaining why it selected the latter for preference. The big difference is that the *Midland* case involves a statute which comes from the Interstate Commerce Act and contains provisions substantially similar to Sections 4(d) and (e) of the Natural Gas Act, whereas *Wichita* does not. This renders *Midland* controlling.

The analogy sought for *Federal Power Commission* v. *Niagara-Mohawk Power Corp.* (1954) 347 U.S. 239 is arti-

ficial and inapposite. No private contract was posed as preventing Federal regulation. That case involved conflict between rights claimed under license from the Federal Power Commission with rights claimed under conveyance from and title held under the State empowered to convey. This Court held that "Riparian water rights, like property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act." Footnote 18 (p. 413) shows that the Senate Committee reported the bill so framed as to secure and preserve the very rights claimed to be destroyed by the Federal enactment: Here Congressional intent is equally plain that the Act shall be superior to any and all rates reserved in contracts, and that no rate can be fixed, changed, filed, or charged except one filed by the natural gas company under Section 4, or found by the Commission in a 5(a) proceeding.

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac. 1130; and *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797, are all cases arising under the same Kansas statute involved in *Wichita* and are subject to the same distinction. The Act does not condition action or power of the natural gas company or the Commission under Section 4 upon such finding.

Attleboro Steam & Electric Co. v. *Narraganset Electric Lighting Co.* (1924, D.C.R.I.) 295 F. 895, is of a class with *Wichita*. While Section 48 of the Rhode Island statute contains language similar to Section 4(d) of the Act, the Court there followed the Supreme Court of Rhode Island in *Rivelli* v. *Providence Gas Co.* (1921) 44 R.I. 76, 115 A. 461, in holding that Section 21 deprived the Commission of Rhode Island of authority to accept or fix rates except after hearing and investigation in which it should find that the existing

rates are "unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provision of said Public Utilities Act." The District Court held that statute was not distinguishable from that before this Court in *Wichita's* case; and that therefore the ruling would be the same (p. 904). Manifestly that does not touch the situation here.

Arkansas Natural Gas Co. v. *Railroad Commission* (1923) 261 U.S. 379 furnishes no assistance to Mobile, for there the Arkansas statute expressly provided that the Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities, or distributing companies, and such contracts shall not be affected by this Act or the Act of which this is an amendment" (p. 381).

The Natural Gas Act contains no such provision.

Southern Utilities Co. v. *Palatka* (1925) 268 U.S. 232, has no connection with the issues here. This case did not involve a regulatory statute or one claimed to control contract rates. The city granted franchise to the utility, specifying rates. The utility announced it would increase rates. The city sued to enjoin the increase over franchise rates; the defense, that franchise rates were so low as to deprive the utility of property without due process, was overruled, the utility refused further to plead; injunction was affirmed by the Supreme Court of Florida. This Court denied that such holding produced lack of mutuality. Lack of mutuality is without basis either at the law or in the contentions of the parties here.

Colorado Interstate Gas Co. v. *F. P. C.* (1944, 10 Cir.) 142 F. 2d 943, affirmed 324 U.S. 581, was a Section 5(a) proceeding instituted by the Commission on its own motion upon complaint of certain municipal and state regulatory bodies to determine whether filed rates were just and reasonable. There was not involved, as here, the question of whether a Section 4 filing superseded a contract rate. Section 5(a) expressly requires a hearing and finding of unjustness and unreasonableness. Obviously the fact must

appear from the evidence adduced, but Section 5(a) is addressed solely to a proceeding questioning whether a pending and approved rate then has become unjust and unreasonable. It has no relation to a rate change proposed under Section 4(d), nor to a hearing under Section 4(e) to determine whether the proposed rate change shall be approved, and established finally as "just and reasonable." Properly read, that portion quoted by the Court below, in the context of the issues for decision, declares that a filed and approved contract rate may be changed in a Section 5(a) proceeding only when the "fact" of unreasonableness is made to appear. This nowhere touches or involves the effect of a Section 4(d) filing upon a filed and pending contract rate. See that portion of the opinion under the heading "Abrogation of Prices fixed by contract prior to effective date of the Act" (p. 593) in which the Court held that exercise of regulatory power under the Commerce Clause could not be subordinated to arrangements previously effected, because entered into "necessarily" with "knowledge" of the paramount authority of regulation.

Probably Mobile in its brief will rely upon the decision of the District of Columbia Circuit in *Sierra Pacific Power Company* v. *Federal Power Commission, et al* (1955, D.C. Cir.) ... F. 2d ....[55] This case arose under the Federal Power Act (16 U.S.C. 824, et seq) which, except on one important point here involved (a) below, is almost identical with the Natural Gas Act. There are several differences between *Sierra* and this case which render *Sierra* inapposite here:

(a) The Act in Section 5(a) provides:

> "* * * or upon complaint of any State, municipality, State commission, or gas distributing company * * *" (App. p. 5).

The comparable section of the Power Act, Section 206(a), provides:

> "* * * or upon complaint, * * *" (App. p. 8).

[55] Pending on writ of certiorari Nos. 51, 53, this Term.

Thus where the Act restricts those competent to make a 5(a) complaint other than the Commission to "any State, municipality, State commission, or gas distributing company," the Power Act contains no restriction whatever. Thus a power company subject to the jurisdiction of the Power Act could under Section 206(a) file a complaint against its own filed and pending rate and secure hearing where the natural gas company cannot under Section 5(a) of the Act.

(b) The record, briefs, and opinion in the Court of Appeals show that the original contract between Sierra Pacific and Pacific Gas & Electric Company was entered into upon express permission of the California Commission first obtained upon the offered and ordered condition that no loss should be passed to other customers, and that if any loss resulted from the particular contract the stockholders of Pacific Gas & Electric Company should assume it. The California Commission a second time adjudged the continuing effectiveness of the condition. There is no indication that lack of jurisdiction of the California Commission to require and enforce the condition was raised, nor its validity attacked. No question apparently was made of the power of the California Commission by such condition to make an exception to the requirement of equal and uniform, just and reasonable rates to all consumers. No such circumstances exist here. The opinion does not disclose whether the Court was influenced by considerations of comity between the California State Commission jurisdiction and Federal jurisdiction in coming to its decision.

(c) The Court in *Sierra* fell into one of the like fundamental errors which embroiled the Court below; both seemed greatly influenced by "special circumstances", "inducements", "new business", and like situations which they considered resulted in an equity warranting protection. In fact, the Commission in *Sierra* admitted substantial evidence upon such special considerations surrounding the

inception and origin of the contract. The Commission and both courts should have refused admissibility and consideration to such claims upon the same grounds stated by the Georgia Court in *Union Dry Goods* v. *Georgia Public Service Corporation*, supra, affirmed by this Court, which held such considerations irrelevant and immaterial to the issue whether or not the proposed rates met the standards of the regulatory statute. Such questions of equity or hardship in any event address themselves to the Congress and not to the courts. (See p. 44-5 herein); Cf. *Antioch Milling Company* v. *Public Service Company* (1954) 123 N.E. 2d 302, 4 Ill. 2d 200.

(d) Citing *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251, *Sierra* held the contract rate continued, saying it may be in the "area" of reasonable rates and so may the proposed rate, in which event the statute is not deprived of its efficacy to give effect to both rates until the contract rate be found unreasonable. But the cited case rejects such reasoning, for there this Court said that the reasonable rate was that rate which "shall be made specific only by exercise of the Commission's judgment in which there is some considerable element of discretion" (p. 251). *Sierra* not only deprives the Commission of the discretion and sole authority to select the "pinpoint" within the "area" which it shall establish as the "just and reasonable" rate, but the Court assumes to set the rate by directing the Commission to exonerate the contract rate until a special proceeding against the contract be had. This judicial invasion of the Commission's statutory power is also condemned by the cited *Montana* case, wherein this Court said that "no rate [may be claimed] as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, *and not even a court can authorize commerce in the commodity on other terms*" (p. 251). Then to make plain that such language applied to the exercise of judicial power, the Court said further that the right to the reasonable rate "is the right to the rate

which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable" (p. 251-2).

In invading the exclusive discretionary province of the Commission, the Court in *Sierra*, as in this case, is at war with the Act. The Fifth Circuit recognized that such action would constitute rate making where the courts had no such power in denying the relief requested in *Tyler Gas Service Co.* v. *United Gas Pipe Line Company* (1955, 5 Cir.) 217 F. 2d 73; and *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947, 5 Cir.) 162 F. 2d 388, cert. den. 332 U.S. 770.

II.

The Act grants no authority to require refund of monies collected from change in rates for industrial resale only filed pursuant to Section 4(d) and not subject to suspension under Section 4(e).

The Court also concluded that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Mobile.[56] In so holding the Court below is in conflict with the holdings of this Court and of the Fourth and Eighth Circuits, that under the Act the Commission has no power to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced." *Federal Power Commission* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 618; *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company* (1951) 341 U.S. 246, 251; *Hope Natural Gas Company* v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, 805; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 U.S. 591; *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company* (1907) 204

[56] Second question presented.

U.S. 426, 439; *State Corporation Commission of Kansas* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, 183.

What was said in *Arrow-Hart Company* v. *Federal Trade Commission* (1934) 291 U.S. 587, is apropos here. The Federal Trade Commission issued a cease and desist order requiring tranfer of certain shares of stock on the ground that the ownership of the stock which brought two competing companies under single control was a violation of the Clayton Act. The question was the power of the Commission to issue the order. The Court said:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of, but if accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed on the theory that this is necessary to render effective the prescribed statutory remedy." (p. 598-9.)

As noted, the Commission having no express power in the Act, possesses "no additional powers of a court of equity" to order refunds or reparations denominated restitution. The Court below is equally without power to so order and thus enlarge the Commission's original or its judicial review powers under the Act; indirectly to accomplish a result the basic Act prohibits.

Too, the Court below fundamentally lacked power to make the order, because the point as ruled was not reserved by Mobile in its petition for rehearing to the Commission. *Federal Power Commission* v. *Colorado Interstate Gas Company* (1955) 348 U.S. 492; Section 19, Natural Gas Act. Mobile's motion for rehearing contended that the Commission, having accepted United's filing under Section 4(d), had the power under Section 4(e), and should have ordered that all monies collected pursuant thereto should, upon

conclusion of the hearing, be ordered refunded if the whole, or any part, should be found to be unjust, unreasonable, or unlawful (I(c) R. 39; Section B, R. 43-4). The contention had nothing whatever to do with refunds in the contingency held by the Court below, i.e., unlawful collections on an illegal filing which the Commission had no power to receive. Indeed, in its original pleading, Mobile expressly admitted the Commission "had a right" to order the hearing (Pa. 10, R. 11). The Court noting Mobile's contention, said:

> "Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies *collected after the acceptance of such filing* be held subject to refund." (R. 154.)

Instead, the Court, sua sponte, held the filing void for want of Commission power to receive it, and asserted power under familar equitable principles to brand such collections illegal, and order them refunded. Its powers of review not being invoked by preservation of the point in the motion for rehearing under Section 19 of the Act, the Court was without any jurisdiction to consider or act upon the principle asserted. *Federal Power Commission v. Colorado Interstate Gas Co., supra.*

Clearly Section 4(e), as to rates subject to suspension, authorizes the Commission in its discretion to require a bond for refund should the increase not be allowed. With equal clarity Section 4(e) denies to the Commission power to order suspension or refund of monies collected pursuant to filed proposed rates for the sale of gas for resale for industrial use only. That Section provides "That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; * * *" though of course it does have power under Section 4(e), if it orders a hearing, to reduce the proposed rate not subject to suspension to the extent it finds the increase unjustifiable.

Section 4(e) grants power to the Commission to order refund only as to rates subject to suspension. In ordering a refund under the circumstances here, the Court below goes entirely outside the Act and requires the Commission to follow after. The rationale of its opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953, 3 Cir.) 202 F. 2d 899 (petition for cert. dism. 345 U.S. 988), was that the Commission's authority and power were limited to those powers granted in the Act. After discussion and analysis, it concluded that familiar judicial concepts furnished no basis for Commission exercise of analogous judicial authority because the statute "which defines the power of the Commission in natural gas matters makes no provision for any such procedures" (p. 902). Yet here the Court bases its decision on the very analogy of judicial concept which it rejected in *Mississippi*. Thus this decision furnishes another instance of intra-circuit conflict.

The Commission is possessed only of power delegated to it by the basic Act, and has no power that is inherent by virtue of its existence (See Fn. 54, p. 76). It follows that the Court below is without authority to order exercise of a power not delegated—i. e., power to order refund under judicial concepts of equitable restitution. In *State Corporation Commission of Kansas* v. *Federal Power Commission* (1954, 8 Cir.) 215 F. 2d 176, in a per curiam opinion the governing principle is there stated:

> "It is pointed out that in rate regulations such as is here involved, the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory. The Court also is limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparation on account of insufficiency of rates in the past. In the process of rate regulation, therefore, the utility must propose a change in the rates under which it is operating and the Commission allows or disallows the change. It is the allowance or disallowance that is subject to

review by the Court. There is no place in the proceeding for either the Commission or the court to accord reparation" (p. 184).

Whether the increased rates for resale for industrial use only proposed as to Mobile were just and reasonable and were to be allowed is by the Act solely confided to the discretionary judgment of the Commission. Thus the Court by this order invades the discretionary jurisdiction of the Commission, fixes and establishes the rate at the contract level, rejects any increase and orders refund of monies collected from the filed rate. Courts may not substitute their judgment and discretion for matters submitted to the discretion of the Commission.[57]

Judicial review under Section 19(b) of the Act does not give the courts power to order the Commission to take action not granted by the basic Act, for their power on such review is limited to the determination of the correctness by the Commission of the exercise of the powers expressly granted and to keep the Commission within the ambit of the basic Act. Thus the Court by such holding over-stepped the permissible bounds of judicial action.

The holding is not justified by the cases of *B. & O. R. Co.* v. *United States* (1929) 279 U.S. 781, and *Arkadelphia Company* v. *St. Louis S. W. Railway Co.* (1919) 249 U.S. 133, which the Court cites. Those cases merely state and apply the age-old rule that where one has lost by the enforcement of a court judgment subsquently reversed, he is equitably entitled to restitution, and so far as discretion deems

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[57] *Colorado Interstate Gas Co.* v. *F.P.C.* (1945) 320 U.S. 581; *FPC* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.* (1945) 325 U.S. 635; *F.P.C.* v. *Natural Gas Pipeline, supra*; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra*; *Algoma Coal & Coke Co.* v. *U.S.* (D.C. Va. 1935) 11 F. Supp. 487; *Carlson* v. *U.S. et al* (D.C.N.Y. 1952) 107 F. Supp. 398; *Merchant Truckmen's Bureau of New York* v. *U.S.* (D.C. N.Y. 1936) 16 F. Supp. 998; *Manhattan Transit Co.* v. *U.S.* (D.C. Mass. 1938) 24 F. Supp. 174; *Board of Railroad Commissioners* v. *Great Northern Ry. Co.* (1930) 281 U.S. 412.

justifiable to have corrected what had been wrongfully done.[58] This doctrine is applicable only to court judgments, not to orders of an administrative agency.

Federal Power Commission v. *Interstate Natural Gas Company*, (1948) 336 U.S. 577, 582, illustrates this. The question arose over a fund accumulated under a stay order issued by the Fifth Circuit against an order of the Federal Power Commission, and this Court said:

> "It is the responsibility of the *court* which distributes the fund accumulated under *its* stay *order* 'to correct that which has been wrongfully done by virtue of its process'. United States v. Morgan, 307 U.S. 183, 197, 83 L. Ed. 1211, 1220, 59 S. Ct. 795."

Thus, the doctrine was applied in accordance with its judicial history to the Court order.

Both *Baltimore* and *Arkadelphia* were court proceedings. The Baltimore suit was one under the Urgent Deficiencies Act.[59] The suit, then, was a plenary suit in an equity court. The court dismissed the bill for want of equity and was reversed, 277 U.S. 291. Upon the coming down of the mandate and in accordance with the directions of this Court, the District Court considered the question of restitution. After hearing, it denied the application for restitution and

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[58] This rule is fully discussed and stated to the same extent from earliest times. Cf. *United States Bank* v. *Bank of Washington* (1832) 8 L. Ed. 299; *U. S.* v. *Morgan* (1939) 307 U.S. 183; *Atlantic Coastline R.R. Co.* v. *Florida* (1935) 295 U.S. 301; *Federal Power Commission* v. *Interstate Natural Gas Co.* (1948) 336 U.S. 577.

[59] The Urgent Deficiencies Act, 38 Stat. 219, 28 U.S.C. Sec. 47, originated in the dispositions made by Congress in 1913 for transfer to and vesting in the district court of the powers of the abolished Commerce Court, 39 Stat. at 219. As carried into the old 28 U.S.C. Sec. 47, the statute is explained as intended to expedite injunctive relief for irreparable damage. *Louisville & N. R. Co.* v. *U.S.* (1915) 238 U.S. 1; *Texas Electric Railway Co.* v. *Eastus* (1938 D.C. Tex.) 25 F. Supp. 825, affirmed 308 U.S. 512; rehearing denied 637; *Scripps-Howard Radio* v. *Federal Communications Commission* (1942) 316 U.S. 4. (See at the present time 47 U.S.C. Sec. 402(a) relating to the Federal Communications Commission.) In substance, the jurisdiction transferred to the district court from the Commerce Court by the Urgent Deficiencies Act of 1913 is that of the general equity powers of a district court.

appeal was again taken. As a result of the "erroneous refusal" of the District Court to set aside an order of the Interstate Commerce Commission, the Supreme Court held that the litigants were required to pay monies they otherwise would not have been required to pay and restitution was ordered. The restitution, however, arose from the order of the District Court, not from the order of the Interstate Commerce Commission.

Equally in *Arkadelphia Milling Co.*, suit was a plenary one in equity seeking to enjoin an order of the State Railroad Commission of the State of Arkansas. Temporary injunctions were issued and plaintiff was required to execute a bond "conditioned that plaintiff should keep a correct account respecting its carriage of passengers and freight showing the difference between the tariff actually charged and that which would have been charged had the rate inhibited been applied * * * and the names of the persons affected as far as practicable" (p. 138). Upon reversal the District Court moved to correct the injury which had arisen *by its order*, so both cases cited by the Court below are in the traditional bounds of the restitution principle.

The mere statement of such circumstances destroys their applicability here. Mobile paid no monies pursuant to a court order; nor pursuant to an order of the Commission, but by direction of the Act itself; for these rates being for the sale of natural gas for resale for industrial use only, the Commission had no choice under Sections 4(d) and (e) of the Act save to permit the rates to go into effect at the end of the 30-day period provided for in Section 4(d). The Commission order admitting United's filing and making it effective is not a judgment; it is the simple memorandum of the performance of a mandatory act required by the explicit and unambiguous terms of Sections 4(d) and (e) of the Act, subject, of course, to the justification of said rates by United in the hearing ordered under Section 4(e). The collections were not enabled or authorized by the Commission order, certainly not by a court order; rather, it is

the Act which is vital, not the documental record of its invocation.

Restitution is a way whereby courts may remedy and rectify their own mistakes; not a procedure whereby courts may remedy or rectify mistakes assertedly made by other constitutional bodies. The Court below did not seek to remedy or rectify a mistake of its judgment, for no monies were paid under the compulsion of its judgment. It sought to remedy what it held to be an invalid exercise of discretionary statutory regulatory power by the Commission. Section 4(d) of the Act gives the Commission two discretionary options: (1) To permit the new filing to become effective in less than 30 days, or (2) for "good-cause shown" to permit the filing to become effective "without requiring the 30 days notice". Section 4(e) also vests the Commission with certain discretionary options upon a filing pursuant to Section 4(d): (1) upon complaint of any State, municipality, or state commission, or upon its own motion it can enter upon a hearing: (2) it "may" suspend the filing during the course of such hearing, but not for a longer period than five months beyond the expiration of the 30 days provided for in Section 4(d), after which it shall go into effect upon motion made; (3) if the hearing be not concluded and if the rates filed pursuant to Section 4(d) are subject to suspension, the Commission "may" require a bond against possibility of refund if the filing be not wholly approved.

In respect of non-suspendible rates for industrial resale only, the discretionary options given the Commission are the options above defined for Section 4(d) only; for while it may hold a hearing under Section 4(e), it cannot prevent their becoming effective at the end of the 30-day period stipulated by Section 4(d).

All of the foregoing options are addressed to the exercise of quasi-legislative functions by the Commission so that even if it be assumed, for argument, that the mandatory order permitting the industrial rates to become effective at the end of 30 days was erroneous, it was an error in the

quasi-legislative field and not the mistake of a judicial body vested with traditional, historical, and inherent equitable powers necessary to the exercise of the doctrine of restitution.[60] Elsewhere we have shown that it is elementary that administrative bodies derive their powers solely and strictly from statute and do not possess either the broad or inherent powers of courts. Administrative powers are strictly construed. Administrative agencies do not command the free range of judgment enjoyed by Federal courts. The restitution power is one clearly judicial in nature, designed to correct injury suffered from judicial process. The attempt to extend its application into a field where it has no historical or logical basis is simply an encroachment upon the legislative field in violation of the separation of powers.

Research has produced no instance where a federal court under comparable circumstances directed an administrative agency to require restitution for money collected as result of an administrative order the Court held erroneously issued. Congress having initially denied the Commission power under the Act to order reparations, courts cannot award reparations by the simple expediency of adjudicating as "void" a mandatory order, labelling the ordered reparations "restitution of monies unlawfully collected", and thus achieve powers directly denied by the statute. Irrespective of the order, the monies were paid by the direction of the statute. The decision below invades and trespasses upon territory forbidden to the courts by the pronouncement in *Montana Dakota Utilities Co.* v. *Northwestern Public Service Company, supra,* that:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate,

[60] See p. 84, 86-8 herein; Fn. 58, p. 88.

whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in commodity or other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable." (p. 251-2.)

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the judgment of the Commission should be affirmed.

Respectfully submitted,

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